Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MARK L SILVERMAN, ET AL.,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Respondent alleged that the Silverman Petitioners and one of Respondent's employee were involved in a "scheme to defraud" Respondent. The evidence at trial was almost exclusively devoted to how Respondent's employee did not comply with Respondent's policies. The district court judge refused to give a conspiracy instruction because Respondent's counsel claimed that it did not have a conspiracy claim.

   a. Can a party be held liable, or a judgment affirmed, on legal theories or claims that were not submitted to, or decided by, the jury, consistent with basic notions of due process?

   b. Should the judgment be set aside because there was no legal basis to attribute to or hold the Petitioners liable for acts, statements or omissions of Respondent's employee.

2. The Silverman Petitioners submitted a motion for summary judgment that was properly supported by deposition testimony and other admissible evidence showing that Respondent could not prove an essential element of all its claims.

   a. Should a district court be able to use a legal standard that was expressly rejected more than twenty years ago to deny a properly supported motion for

summary judgment without any appellate review at all?

b. Should the denial of the motion for summary judgment in this case be reversed and judgment entered in favor of Petitioners?

3. Petitioners offered a public record into evidence, which contained information directly rebutting the testimony of Respondent's employees, including Respondent's only witness on damages. The public record would have allowed Petitioners to cross examine this witness by showing that she said one thing on the stand, but did something else. Without the testimony of this witness, Respondent could not have prevailed on any of its claims against Petitioners. The district court judge refused to admit the public record into evidence because Respondent and a non-party to this case had agreed to call the public record "confidential."

a. Can a party prevent the admission of relevant evidence contained in a public document because the party has agreed with a non-party to call the public record "confidential"?

b. Are Petitioners entitled to a new trial so that they can confront and cross examine Respondent's employees with evidence that they say one thing on the witness stand, but do something else entirely?

PARTIES TO THE PROCEEDINGS

Petitioners Mark L. Silverman, Mark L. Silverman M.D., J.D., P.C. Mark L. Silverman M.D., J.D., P.C., Lori Andres, as Guardian for Raymond Andres, Mellissa Davis, as Guardian for Betty Davis, Mark Phillips, as Successor Guardian for Raymond Andres, Sonja Scott, Tracey Shures, as Guardian for John Shures, and Romana Thomas, as Guardian for John Gentris, were counter-defendants in the district court and appellants in the court of appeals.

Respondent State Farm Mutual Automobile Insurance Company was the defendant and counter-plaintiff in the district court and the appellee in the court of appeals.

Robert Rivet was the plaintiff and a counter-defendant in the district court, did not participate in the court of appeals and is not expected to appear in this court. Linda Swagler and Linda Swagler Consulting, LLC were counter-defendants in the district court, did not participate in the court of appeals and are not expected to appear in this court.

CORPORATE DISCLOSURE STATEMENT

Mark L. Silverman, M.D. P.C. and Mark L. Silverman, M.D., J.D., P.C. do not have any parent companies, and no publicly held companies hold any stock of either of these Petitioners.

American Guarantee and Liability Insurance Company, which is affiliated with Zurich Financial Services, is an insurer of Mark L. Silverman and Mark L. Silverman M.D., J.D., P.C. and has provided a defense under a reservation of rights. Zurich Financial Services is listed on the Swiss Stock Exchange and traded on the virt-X under the symbol "ZURN".

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is not reported, but can be found at 2009 WL 614766 and is reproduced in the Appendix at 1 - 18.

JURISDICTION

The court of appeals issued its opinion and judgment on March 12, 2009. It entered its order denying the motion for reconsideration on April 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be

> subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The version of Federal Rule of Civil Procedure 56(c) in effect while this case was pending in the district court provided that:

> **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Federal Rule of Evidence 501 provides that:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Michigan Court Rule 8.119(E)(1) provides that:

> Unless access to a file, a document, or information contained in a file or document is restricted by statute, court rule, or an order entered pursuant to subrule (F), any person may inspect pleadings and other papers in the clerk's office and may obtain copies as provided in subrule (E)(2) and (E)(3).

INTRODUCTION

Petitioners did not receive a fair trial from the district court judge that Respondent, State Farm Mutual Automobile Insurance Company, selected for this case. He rewarded State Farm's confidence in him by systematically ruling in State Farm's favor on every substantive legal issue before him, facilely changing his reasoning and factual findings to suit whatever State Farm needed at the moment. The district court judge's rulings included his finding that:

- allegations alone are a sufficient basis to deny a motion for summary judgment;
- State Farm could prevent the admission of a public record that contained damaging evidence by agreeing with a non-party to call the public record confidential;
- an attorney could be held liable to the adversary of the attorney's client because of what the attorney did not tell the adversary;
- State Farm could conduct unilateral discovery during trial;
- State Farm could not be compelled to produce a Rule 30(b)(6) designee for deposition, and
- State Farm could call a fully prepared witness at trial to testify on the subjects designated under Rule 30(b)(6) even though State Farm

refused to produce a prepared witness to testify on the designated subjects.

When the case arrived in the court of appeals, the proceedings became positively Kafkaesque. For example, the court of appeals concluded that a partial frontal lobectomy was not a serious injury. It also found that the Petitioners had not proposed a jury instruction on a key issue when they had actually proposed four.

But, what is really shocking is that the court of appeals affirmed the judgment based upon two legal theories that were never raised in the district court. One of these new theories was raised by State Farm for the first time at oral argument. The second was not even raised by State Farm. Instead, the circuit court itself raised the theory in its opinion affirming the judgment. Obviously, none of the Petitioners had the opportunity to perform discovery, brief the elements of these new claims, introduce evidence to rebut them, or request and receive proper jury instructions on these new theories. Most importantly, the Silverman Petitioners never had the chance to have a jury decide if they were liable on these claims.

Appellants certainly face a daunting task appealing from a judgment entered after a jury trial. But, they are at least entitled as a matter of due process to appellate review of the case that was actually pled, tried and submitted to the jury.

As a result, the course of conduct in the district court departed so far from the accepted and usual course of judicial proceedings that it calls for this Court to exercise its supervisory power. This Court should also review the circuit court opinion because it affirmed the district's departures. Finally, because of its own departures from the accepted and usual course of judicial proceedings, the circuit court has invited this Court's review of its opinion.

STATEMENT OF CASE

Petitioner Mark L. Silverman is an attorney that practices law with Petitioner Mark. L. Silverman, M.D., J.D., P.C. (the "Legal PC"). He is also a physician practicing medicine through Petitioner Mark L. Silverman, M.D., P.C. (the "Medical PC").[1] Mr. Silverman has always prided himself on taking on the cause of the "little guy" against large, well funded, interests. Mr. Silverman was recognized as Michigan attorney of the year when he agreed to represent the mother of a brain-damaged child whose attorney abandoned her just before trial.

One of Mr. Silverman's clients was Plaintiff Robert Rivet. Mr. Rivet was catastrophically injured in an automobile accident. Like other catastrophically injured clients of Mr. Silverman, Mr. Rivet reached an agreement with Respondent State Farm to settle his claims for insurance benefits from State Farm under

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[1] These three Petitioners will be referred to collectively as the "Silverman Petitioners."

Michigan no-fault automobile insurance law. After State Farm breached his agreement, Mr. Rivet became the fifth of Mr. Silverman's clients to sue State Farm.

One week before trial, the district court held its final pre-trial conference. State Farm had neither filed a witness list nor cooperated in preparing the joint final pre-trial order, as required by local court rule and court order. The prescribed sanctions for such failures include entry of a default judgment and being barred from calling witnesses or introducing evidence at trial.

Instead of a witness list or a proposed pre-trial order, State Farm arrived at the final pre-trial conference with two new law firms, three new lawyers and a proposed 111 page, 385 paragraph counterclaim. The new pleading alleged that the Silverman Petitioners and a State Farm claims representative, Linda Swagler, had defrauded State Farm. This counterclaim also named five other clients of Mr. Silverman, who were pursuing separate breach of settlement contract lawsuits against State Farm, as counter-defendants. The claims against Mr. Silverman's clients were to invalidate the settlement agreements that formed the basis for their pending breach of contract lawsuits. After refusing to give Mr. Silverman the time to read the entire proposed pleading, let alone file any response to the motion, the district court granted the motion to amend. Although he could not wait until Mr. Silverman had read the proposed pleading before granting State Farm's motion, Judge Friedman had enough time to heap praise upon State Farm's new local counsel.

One of the effects of allowing the amendment was to transfer all of the pending cases by Mr. Silverman's clients to Judge Friedman, who originally presided over only the case filed by Mr. Rivet and a case filed after Mr. Rivet had filed his lawsuit. This decision also amounted to authorizing the delayed removal of three of these lawsuits from state court to federal court because State Farm had not removed the first three cases that Mr. Silverman's clients had filed.

State Farm has never explained why it decided to seek leave to file its counterclaim in this particular case and before this particular judge. This case was the fifth to be filed by one of Mr. Silverman's clients. It was also the second case that State Farm decided to remove to federal court, but the first removed case was assigned to a different judge. Judge Friedman is a friend of a founding partner of State Farm's local counsel. This particular attorney had developed animosity toward Mr. Silverman when Mr. Silverman represented a client that sued a member of a prominent local political family, who was represented by this attorney.

After all of these cases were effectively transferred to Judge Friedman, the district court proceedings were incredibly one sided. This is best illustrated by how the district court not only prevented Petitioners from conducting discovery on the issue of damages, but also refusing to admit a public record that rebutted the evidence of damages that State Farm was allowed to wait until trial to reveal.

Because of the critical nature of this issue, the Silverman Petitioners had served written discovery on it almost immediately after answering the counterclaim. But, instead of providing a legitimate answer, State Farm first listed the entire amount of every single payment that it had ever made to any of Mr. Silverman's clients or to him directly as damages, whether or not these payments were related to any allegations in the counterclaim. State Farm knew that the entire amount of every payment could not be its damages because it acknowledged that all of Mr. Silverman's clients were catastrophically injured and that State Farm owed them substantial no-fault insurance benefits. Eventually, State Farm eliminated some of these payments from its answer, but continued to contend that the entire amount of all the payments it did list were damages.

After these discovery methods were stymied by State Farm, the Silverman Petitioners served a notice of a 30(b)(6) deposition, which required State Farm to designate a person to testify regarding how much State Farm believed it should have paid in benefits instead of what it did pay. One of the purposes of this rule is to prevent the type of stonewalling that State Farm had been conducting. State Farm designated Ruthann Tuttle, a State Farm claims representative, to testify on this issue. Ms. Tuttle had signed State Farm's interrogatory answers listing the entire amount of all its payments as damages. After she testified that she did not know why the entire amount of all payments were damages, State Farm counsel stripped her of the 30(b)(6) designation on this topic halfway during the deposition. A few weeks later State Farm produced a

second 30(b)(6) designee. She testified that she did not know what portion of State Farm's payments was claimed as damages.

Therefore, the Silverman Petitioners moved to compel State Farm to produce a prepared 30(b)(6) designee. But, the district court concluded that it could not compel State Farm to produce such a witness. Judge Friedman did state that State Farm should be barred from offering evidence on this issue at trial if it could not produce a prepared witness for deposition. Judge Friedman also stated that State Farm's failure to produce such a witness was good news for Petitioners because it meant that State Farm could not prove its case.

Since discovery was now closed, the Silverman Petitioners moved for summary judgment because State Farm did not know what its damages were. The only evidence submitted by State Farm in response to the motion was an affidavit from the second designee testifying that she did not review any files before her deposition. In other words, all that the affidavit proved was that State Farm had ignored its obligations under Rule 30(b)(6).

Under well established law, Petitioners should have prevailed on this motion. But, despite his earlier statements, Judge Friedman changed his position and denied the motion because of unidentified fact questions. When asked to identify the admissible evidence creating these unknown fact questions, Judge Friedman stated that:

> But they [State Farm] claim . . . according to their pleading that there are damages.
>
> * * *
>
> I can't tell you exactly what their case is all about because I haven't heard it yet. . . . but at least at this point they have alleged it at this point, they have indicated they don't know the precise amount but that there are damages as they pled in this matter.

Five weeks before trial, State Farm served an interrogatory answer that actually listed what portion of its payments State Farm was contending were damages. The new interrogatory answer was signed by Ms. Tuttle, whose 30(b)(6) designation was stripped on this issue during her deposition. This answer was based entirely upon information that State Farm had in its possession since no later than June 2004. The Silverman Petitioners immediately filed a motion seeking relief under Rule 37, including appropriate sanctions. Judge Friedman ignored this motion until two weeks into the trial. Despite his prior statements, Judge Friedman not only allowed State Farm to offer the new "evidence," but refused to compel State Farm to produce Ms. Tuttle for deposition. State Farm was then allowed to call Ms. Tuttle to testify at trial on this issue even though State Farm had prevented Petitioners from deposing her on it.

Despite all of this, the Petitioners had one "ace in

the hole" left. State Farm had settled the claims by one of Mr. Silverman's clients whose case was expressly mentioned in the counterclaim, but who was not named as a party. The settlement was documented in a public record, which had been obtained by Petitioners. This settlement was for more money than almost all of the settlements that State Farm claimed were too high because of alleged fraud. The settlement was authorized by Ms. Tuttle and her supervisor. It would have impeached Ms. Tuttle because it showed that she said one thing, but did another.

Judge Friedman, however, refused to admit the settlement transcript because State Farm said it was "confidential."[2] When he initially refused to admit the settlement transcript, Judge Friedman said on the record that he would admit it if the state court judge who had presided over this settled case agreed it could be used. So, the Silverman Petitioners obtained an order from this state court judge, who confirmed that the transcript was a public record and that State Farm witnesses could testify regarding it without violating any confidentiality provisions. But, when the Petitioners offered the transcript into evidence a second time, Judge Friedman ignored his prior words and simply found new reasons to refuse to admit the transcript.

With the benefit of these and other errors, State Farm obtained a large monetary judgment against the

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[2] The settlement transcript was actually a public record under Michigan law. Mich. Ct. R. 8.119(E)(1).

Silverman Petitioners. The district court also set aside five agreements that State Farm had made with Mr. Silverman's clients.

The opinion affirming the judgment was unusual. For example, the court of appeals concluded that a partial frontal lobectomy was not a serious injury. It also found that the Petitioners had not proposed a jury instruction on a key issue when they had actually proposed four.

But, what is most remarkable is that the court of appeals affirmed the judgment based upon two legal theories that were never raised in the district court. One of these new theories was raised by State Farm for the first time at oral argument. The second was not even raised by State Farm. Instead, the circuit court itself raised the theory in its opinion affirming the judgment. Obviously, none of the Petitioners had the opportunity to perform discovery, brief the elements of these new claims, introduce evidence to rebut them, or request and receive proper jury instructions on these new theories. What is most important, the Silverman Petitioners never had the chance to have a jury decide if they were liable on these claims. Based upon these legal and factual findings, the judgment was affirmed by the court of appeals.

The district court had subject matter jurisdiction over the original claim based upon diversity. 28 U.S.C. § 1332(a). The United States court of appeals had subject matter jurisdiction over the appeal to it because the appeal was from a final decision of a district court. 28 U.S.C. § 1291.

SUMMARY OF ARGUMENT

Due process is one of the fundamental rights enjoyed by Americans. It includes the right to notice of claims, and the opportunity to defend against them, Despite these fundamental principles underlying Anglo-American jurisprudence, the court of appeals found that the Silverman Petitioners were liable on one legal theory that was not raised by State Farm until oral argument and a second that the court of appeals raised in its opinion. Because Petitioners did not receive notice of the claims on which they were held liable until their appeal was resolved, they were deprived of their constitutional right to defend themselves against these claims and have a jury decide whether they were liable to State Farm.

The district court used a standard of review that this Court rejected more than twenty years ago to deny a properly supported motion for summary judgment filed by the Silverman Petitioners. Had the district court applied the correct standard of review, it would have not only granted the motion, but it should have also dismissed claims against three of the other Petitioners for lack of subject matter jurisdiction.

The district court refused to admit into evidence a public record that showed that one of State Farm's key witnesses said one thing on the witness stand, but did something else. The district court refused to admit this public record because State Farm and a non-party agreed to call this public record "confidential." By refusing to admit this public record, the district court prevented the Silverman Petitioners from confronting

and cross-examining this key State Farm witness.

ARGUMENT

I. Petitioners' Due Process Rights Were Violated When the Court of Appeals Affirmed the Judgment on Legal Claims That Were Never Decided by the Jury Because They Were Not Even Raised until the Appeal.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). This right was violated when the judgment against the Silverman Petitioners was affirmed on two legal theories that were never pled or briefed, let alone submitted to, or decided by, the jury. Instead, they raised for the first time on appeal and decided by a circuit court panel, not a jury.

The first claim against the Silverman Petitioners was for fraud, and the declaratory judgment claims against their clients were based upon alleged fraud. Under Michigan law, a fraud claim requires clear and convincing proof that the plaintiff relied to its detriment upon a knowingly, material, factual, misrepresentation made by the defendant and intended to cause such reliance. *See City of Novi v. Robert Adell Children's Funded Trust*, 473 Mich. 242,

253 n. 8, 701 N.W.2d 144 (2005). State Farm team managers admitted that they never relied upon any statement that Mr. Silverman had made. Moreover, most of Mr. Silverman's statements were opinions, arguments or otherwise not of the sort that could justify a fraud claim, whether State Farm relied upon them or not. Finally, Michigan case law clearly holds a claim of fraud by omission may only be pursued against a defendant that had a duty to disclose. *M & D, Inc. v. W.B. McConkey*, 231 Mich. App. 22, 32, 585 N.W.2d 33, 37 (1998).

Therefore, State Farm needed a legal basis to find the Silverman Petitioners vicariously liable for what Ms. Swagler had said or done while at State Farm.[3] A conspiracy claim can provide such a legal basis. Fed. R. Evid. 801(d)(2)(E). But, the counterclaim did not allege conspiracy. Instead, it alleged that the Silverman Petitioners and Ms. Swagler were in a "scheme to defraud" State Farm. No reported Michigan decision has ever held that a "scheme to defraud" is a tort separate and apart from conspiracy. Therefore, to substantiate its "scheme" claim, State Farm has "paraphrased" Michigan case law by changing the word "conspiracy" to the word "scheme."

A reasonable inference from the pleadings and prior

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[3] The Petitioners do not contest, under the applicable appellate standards of review, that there was insufficient evidence to support the jury's verdict against the former State Farm employee, Ms. Swagler, on the fraud claim against her.

briefing was that State Farm was actually pursuing a conspiracy claim. Therefore, the Silverman Petitioners requested four jury instructions defining the elements of a conspiracy claim. But, during argument about jury instructions, State Farm counsel stated that State Farm had not pled a conspiracy claim, only a "pure fraud claim." As a result, the district court judge did not instruct the jury on any of the well-defined elements of a conspiracy claim.

A judgment after a jury trial cannot be based upon a claim that was never submitted to the jury. Instead of reversing the judgment, however, the court of appeals found that the Silverman Petitioners were liable based upon Ms. Swagler's conduct because it concluded that Mr. Silverman was involved in a "collusive agreement" with her. (App. at 6). But, even though the counterclaim was 111 pages and 385 paragraphs long, it never mentions the phrase "collusive agreement." Instead, the court of appeals both raised this new, potential, claim for the first time in its opinion and then held Petitioners were liable on it.

During oral argument in the court of appeals, State Farm counsel raised *Korn Family LP v. Harbor Building Co.*, an unpublished Michigan court of appeals decision decided nine months after the trial concluded, as a basis for finding the Petitioners liable without the need to plead or prove a conspiracy claim. Unpublished decisions have no precedential value. Mich. Ct. R. 7.215(C)(1). "Concert of action" was not

pled in the counterclaim.[4] Despite this, the court of appeals relied upon *Korn* to find that the Silverman Petitioners could be held liable for Ms. Swagler's conduct on a "concert of action" theory. (App. at 6).

Since the "collusive agreement" and "concert of action" theories were not raised until almost two years after the trial concluded, the jury was obviously not instructed on the elements of this possible cause of action. In addition, neither theory was raised in the pleadings nor mentioned in any brief filed in the district court. Therefore, Petitioners never had the chance to (1) research or brief the elements of these claims, (2) conduct discovery related to them, (3) introduce evidence to show they were not liable on them, (4) request and receive proper jury instructions, (5) have a jury decide if they were acting pursuant to a "collusive agreement" or a "concert of action" and (6) move for judgment in their favor on this claim.

Had "collusion" been pled as a claim, then the Petitioners could have briefed the fact that a close reading of Michigan case law reveals that older cases sometimes use "collusion" and "conspiracy" as synonyms, both requiring a common purpose or agreement to achieve an improper ends. *Cf. Kefuss v. Whitley*, 220 Mich. 67, 88, 189 N.W. 76, 83 (1922) (collusion case finding that "everything said, done, or written by any one of the parties to the combination, in furtherance of the common purpose, is deemed the act

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[4] "Concert of action" was expressly pled in the *Korn* pleadings.

of all."); and *Temborius v. Slatkin*, 157 Mich. App. 587, 599-600, 403 N.W.2d 821 (1986) ("Civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose . . . ."). There is, then, no legal difference between the elements of a collusion claim and the elements of a conspiracy claim. Therefore, there is also no dispute that the jury was not instructed on the elements of this claim.

Michigan cases have not used "concert of action" to hold one defendant vicariously liable for what another has said. Instead, Michigan case law recognizes "concert of action" as a method of finding all defendants liable when it is not possible to determine which of them caused plaintiff's injury. For example, in *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 338, 343 N.W.2d 164 (1984), the Michigan Supreme Court explained that the concert of action theory is best illustrated as being a means to hold the drivers of all cars that were drag racing liable even though only one hit the plaintiff. This is clearly a factually much different situation from this case.

Therefore, by affirming the district court judgment on legal theories that was never pled, litigated or decided by a jury, the court of appeals violated the due process rights that all the Petitioners had. As a result, this Court should step in and find that the Silverman Petitioners were not liable on the fraud claim and that the agreements of the remaining Petitioners cannot be set aside based upon the fraud committed solely by Ms. Swagler.

II. This Court Should Review the Denial of a Motion for Summary Judgment under the Circumstances of this Case and Find that the Silverman Petitioners Are Entitled to Judgment as a Matter of Law.

An essential element of all of State Farm's claims against the Silverman Petitioners was that State Farm had actually paid more than it should have paid to the clients of the Silverman Petitioners. They moved for summary judgment under Rule 56 because State Farm lacked the evidence to prove this element of their claims. The second 30(b)(6) designee's admissions that she did not know how much State Farm should have paid any of Mr. Silverman's clients supported this motion.

If State Farm's 30(b)(6) designee did not know, then State Farm did not know. *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006)("Rule 30(b)(6) designee . . . presents the corporation's "position"). The Silverman Petitioners, then, clearly met their initial burden of showing the absence of evidence to support the counterclaims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To avoid dismissal, State Farm had to submit evidence creating a genuine issue of material fact. *Id.* at 324, (1986) (requiring "the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'").

But, the only "evidence" that State Farm submitted

was the affidavit of the second 30(b)(6) designee testifying that she did not know how much State Farm should have paid Mr. Silverman's clients because she did not review any files before the 30(b)(6) deposition. State Farm did not submit an affidavit from anyone that reviewed the files to determine how much State Farm claimed it should have paid or the factual basis for this conclusion. Therefore, State Farm's response was based solely upon the argument of its counsel. Consequently, State Farm did not meet the burden this Court imposed upon it as the non-moving party. As a result, the Silverman Petitioners were entitled to summary judgment as a matter of law. *Celotex*, 477 U.S. at 323 ("the plain language of Rule 56(c) mandates the entry of summary judgment, . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

When denying the motion to compel State Farm to produce a prepared Rule 30(b)(6) designee, Judge Friedman said that the failure to State Farm to produce such a witness was good news to Petitioners because it meant that State Farm could not prove its claim. But, now, Judge Friedman denied the motion for summary judgment because State Farm had created unidentified questions of fact by **alleging** that it had damages. He was right the first time. In 1986, this Court expressly rejected mere allegations as a sufficient basis for avoiding summary judgment. *Celotex*, 477 U.S. at 324. Therefore, the district court committed a clear error of law by refusing to follow controlling precedent and denying a Rule 56 motion

that should have been granted as a matter of law.

Generally, interlocutory orders are merged into the final judgment and can be reviewed on appeal. *U.S. v. Sandles*, 469 F.3d 508, 518 n. 6 (6th Cir. 2006). But, the Sixth Circuit and many other circuits have decided not to provide appellate review to the denial of motions for summary judgment if a trial was conducted after the motion was denied. *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990). The rationale behind this rule is that it is "unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial." *Id.*, 896 F.2d at 1016, n. 1.

An exception from this rule exists "where the denial of summary judgment was based on a question of law rather than the presence of material disputed facts [because] the interests underlying the rule are not implicated." *U.S. ex rel. A+ Homecare, Inc. v. Medshares Management Group, Inc.*, 400 F.3d 428, 441 (6th Cir. 2005). *See also Howell v. Polk*, 532 F.3d 1025, 1028 n. 3 (9th Cir. 2008) (reviewing denial of summary judgment after the subsequent trial because party alleged "error of law that, if not made, would have required the district court to grant the motion.").

No statute prevents this Court from reviewing the denial of a motion for summary judgment. No prior decision by this Court has been found on this issue so this Court is not limited by *stare decisis*. Consequently, nothing prevents this Court from

reviewing the denial of this motion for summary judgment. The are many reasons why this Court should review the decision to deny this motion.

First, the summary judgment stage can be the most crucial stage in resolving the rights of the parties. There is no legitimate reason to completely bar appellate review of such a critical phase of trial court proceedings.[5] As explained below, the denial of this motion tremendously affected the rights not only of the Silverman Petitioners, but of their clients as well.

Second, the district court judge used a completely erroneous legal standard to consider the motion when he denied it because State Farm had submitted allegations, not evidence, of damages. Because this is an error of law, it fits within one category of cases where appellate courts review the denial of motions for summary judgment. Moreover, State Farm clearly did not submit any evidence creating a genuine issue of material fact. Therefore, reviewing the denial of this motion does not require a detailed review of competing affidavits and similar evidence.

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[5] Limiting the timing of appellate review of interlocutory decisions while the lower court proceedings are ongoing does serve important principles, such as limiting piecemeal appellate review and preserving judicial resources. *See, e.g.*, 28 U.S.C. § 1292. There is obviously a significant difference between limiting when appellate review can take place and completely barring such review.

Third, the erroneous denial of the motion for summary judgment allowed the district court to continue to exercise subject matter jurisdiction over the claims of three of Mr. Silverman's clients. These three clients (Andres, Davis and Gentris) had lawsuits pending against State Farm in state court before Mr. Rivet filed suit. The state court lawsuit on behalf of Mr. Andres had already been resolved against State Farm when the summary judgment motion was denied. Therefore, the district court should not have continued to exercise jurisdiction over the three claims for declaratory relief. *See, e.g., Scottsdale Ins. Co. v. Roumph*, 211 F.3d 964, 967-968 (6th Cir. 2000). The possibility that an erroneous legal decision allowed the improper exercise of subject matter jurisdiction by the district court justifies careful review of this particular decision to deny summary judgment.

Fourth, the basic premise underlying the general reluctance to review the denial of motions for summary judgment is that it would not be fair to enter judgment against a party that prevailed in a trial where all the evidence was admitted. *Jarrett*, 896 F.2d at 1016, n. 1. But, this presumes that all the evidence was presented at trial. In this case, however, the manner in which the motion was briefed and denied was one reason why all of the potential evidence was not presented at trial.

Unfortunately, some parties do not answer discovery in the spirt intended by the federal rules of civil procedure. In this case, for example, State Farm served two deliberately misleading interrogatory answers because it knew that the entire amount of all payments could not be its damages. State Farm then

ignored its obligation to produce a prepared 30(b)(6) designee for deposition. A party litigating against such a recalcitrant opponent can use a properly supported motion for summary judgment as a final discovery request because a properly supported motion requires the non-moving party to produce the evidence showing that a genuine issue of material fact exists to justify a trial. Otherwise, the party will lose the motion.

But, here, State Farm did not produce this evidence. The district court's application of the incorrect legal standard to ratify this conduct allowed State Farm to continue to hide the purported factual basis for its damage theory. As a result, State Farm continued to prevent the Silverman Petitioners from developing a response to the evidence that State Farm already had, but was allowed to wait until trial to produce. Therefore, the denial of this motion ensured that not all of the evidence was presented at trial. It is not unjust to set aside a verdict obtained under these circumstances and enter judgment in favor of the Petitioners. Instead, State Farm would have only itself to blame for this outcome.

Therefore, this Court should review the denial of this motion for summary judgment, apply the correct standard and enter judgment as a matter of law in favor of the Silverman Petitioners on all of State Farm's claims against them.

III. The Trial Court and the Court of Appeals Erred by Prohibiting Petitioners from Introducing Evidence and Cross Examining Witnesses Regarding a Public Record That Contained Evidence Devastating to State Farm's Case Because State Farm and a Non-party Agreed That the Public Record Was Confidential.

The right to due process includes the right to "an effective opportunity to defend by confronting any adverse witnesses. . . ." *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970). By refusing to admit the transcript of a settlement between State Farm and one of Mr. Silverman's clients, the district court effectively prevented the Petitioners from confronting Ms. Tuttle, one of State Farm's key witnesses, with the fact that she says one thing, but does another. This particular public record rebutted essential parts of State Farm's theories regarding causation and damages.

One of State Farm's key assertions in this case was that the terms of settlements between State Farm and Mr. Silverman's clients were fraudulent in and of themselves. It also contended at trial that the amounts paid to these clients were in excess of various State Farm policies and that these excess amounts were therefore damages. The bulk of this evidence was introduced through Ms. Tuttle. But, Ms. Tuttle and her supervisor both approved the settlement of the claims by the Apostolopoulos family even though it also violated these purported policies, which showed these policies did not actually exist and were not violated.

In addition, the payments that Ms. Tuttle and her

supervisor approved under the Apostolopoulos settlement also exceeded the same standards used by State Farm at trial to establish its damages in this case. But, the district court refused to admit this evidence and the court of appeals affirmed this decision even though refusing to admit this public record prevented the Silverman Petitioners from exercising their due process rights and confronting Ms. Tuttle's testimony.

For example, State Farm has contended that the settlements at issue in this case were fraudulent because some were for three, four and five years and one was in perpetuity, all in violation of a purported State Farm policy. But, the Apostolopoulos settlement was for the rest of the injured person's life, which shows that State Farm did not have this policy and that it was not fraudulent for Mr. Silverman's clients to have settlement agreements that were three, four or five years long.

State Farm also contended that it was fraudulent for Ms. Swagler to approve settlements in which the families of Mr. Silverman's clients were paid to provide attendant care to injured family members for 24 hours a day and seven days a week. Ms. Tuttle approved the Apostolopoulos settlement even though it did exactly the same thing.

At trial, State Farm offered a survey that it had created showing what rates it believed should be paid in different parts of Michigan and for different levels of

attendant care.[6] Ms. Tuttle then compared the rates paid in the settlements at issue in this case with the rates in the survey. She then testified that rates in excess of the payments listed in the survey were State Farm's damages. But, Ms. Tuttle herself decided to pay Apostolopoulos family far more than the rates listed in this survey.

Ms. Tuttle also testified that State Farm would not pay family members at the same rates as listed in its survey for attendant care to be provided by licensed practical nurses (LPNs) or registered nurses (RNs) unless there were a prescription requiring LPN or RN care. But, Ms. Tuttle decided to pay the Apostolopoulos family more than both LPN and RN rates even though neither LPN nor RN care was prescribed.

In short, the Apostolopoulos settlement showed that Ms. Tuttle said one thing, but did another, which is one of the most effective means of cross examining a witness.

But, the district court refused to admit the transcript of this settlement. As a result, the jury never heard about it, and the Petitioners were not able to confront and cross examine Ms. Tuttle and her

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[6] Petitioners did not see the survey until trial because State Farm did not answer the interrogatories adequately, did not produce a prepared 30(b)(6) designee and did not submit evidence in response to the motion for summary judgment.

supervisor regarding why State Farm claimed it was fraudulent for Ms. Swagler to do what both of them did in another claim by a catastrophically injured person represented by Mr. Silverman.

None of the explanations for refusing to admit the Apostolopoulos settlement were justified. When the Silverman Petitioners offered the settlement transcript during its cross examination of Ms. Tuttle, the trial court found that it was confidential even though transcripts of court hearing are public records under Michigan law. Mich. Ct. Rule 8.119(E)(1). At that time, the district court judge said that he would admit the transcript if the state court judge that presided over case allowed it. Once again, this promise did not last very long.

The state court judge then entered an order confirming that the transcript was a public record, that it could be used at the trial in this case and State Farm representatives would not violate any confidentiality provisions by answering questions about it. But, when the Petitioners offered the transcript into evidence again, Judge Friedman simply found new reasons to keep it out of evidence. He claimed that the order was obtained *ex parte* when it was not. He then decided this public record would not be admitted because State Farm and the Apostolopoulos family had agreed to call the transcript confidential. But, the federal rules of evidence expressly provide that determinations of privilege are to be made in accordance with state law in diversity cases, and Michigan law expressly makes the transcripts of court hearings public records. Fed. R. Evid. 501, Mich. Ct. R. 8.119(E)(1).

The district court also found that the transcript was not relevant. State Farm alleged in the counterclaim that the Apostolopoulos settlement was part of the scheme to defraud State Farm. The district court did not explain how evidence regarding allegations in the pleadings cannot be relevant. Moreover, if the terms of the Apostolopoulos settlement did not make it much less probable that State Farm's claims were true, then State Farm would not have tried so hard to prevent the jury from hearing about them.

Finally, while Petitioners were barred from cross examining Ms. Tuttle about the Apostolopoulos settlement that she approved, the jury did hear State Farm counsel cross examine Ms. Swagler about how she approved settlements at higher rates than the Apostolopoulos family was paid before they sued State Farm and Ms. Tuttle agreed to pay them 50% more than the original rate. The jury never learned that Ms. Tuttle agreed to pay the Apostolopoulos family more than seven of the nine settlements State Farm contended were fraudulent. The district court's allowing State Farm to use the original settlement in this matter while barring the Petitioners from using the Tuttle approved settlement in the same manner confirms the parties were playing on different and uneven fields at trial.

The course of conduct regarding the Apostolopoulos transcript in the district court departed very far indeed from the accepted and usual course of judicial proceedings. The circuit court approved this departure. Therefore, this Court should review these decisions.

IV. Respondent Will Attempt to Divert this Court's Attention from These Issues by Raising Extraneous Issues.

State Farm will not have a direct response to most of the issues raised in this Petition. Instead, it is likely to repeat arguments raised below. For example, it will argue that Mr. Silverman and Ms. Swagler made a tremendous number of telephone calls to each other. This is true. They were friends, and Mr. Silverman once represented Ms. Swagler's daughter just like he once represented State Farm itself and also represented a State Farm claims representative.

Without such telephone calls, Mr. Silverman was able to negotiate a settlement agreement with Ms. Tuttle. The Tuttle approved settlement agreement contained terms and levels of payments that were substantially identical to the ones that State Farm claimed it was fraudulent for Ms. Swagler to approve. The only conclusion from this is that the telephone calls were not the reason why Ms. Swagler approved these agreements. Instead, they were in accordance with State Farm policy just like the Apostolopoulos settlement. At the very least, the Silverman Petitioners were entitled to have a jury decide whether these agreements were any more fraudulent than the Apostolopoulos settlement.

Another theme that State Farm will raise is that evidence showed that Mr. Silverman manipulated computer information about written settlement agreements. The court appointed computer expert had performed an extensive examination of the computers

used by the Silverman Petitioners during discovery. But, he admitted that this examination was not conclusive one way or the other regarding on this issue. Instead, only the unilateral discovery that State Farm was permitted to conduct during trial that showed that this purported manipulation had taken place. Therefore, discovery taken at a time when the adversary will not have the time to rebut it should carry little weight in this Court.

CONCLUSION AND RELIEF REQUESTED

Petitioners respectfully request that this Honorable Court grant their petition, review the lower court decisions, reverse the judgment entered against them and either enter judgment in their favor or remand for further proceedings consistent with this Court's decision.

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No. 07-1864

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT RIVET, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant/Counter-Plaintiff-Appellee, MARK L. SILVERMAN; et al., Counter-Defendants-Appellants.	) ON APPEAL FROM) THE UNITED) STATES DISTRICT) COURT FOR THE) EASTERN) DISTRICT OF) MICHIGAN

Before: MERRITT, COLE and SUTTON, Circuit Judges.

SUTTON, Circuit Judge. This appeal stems from a six-week jury trial, as well as a related bench trial, that led to a $4.2 million verdict and several declaratory judgments, premised on fraud and fiduciary breach, against attorney Mark Silverman and State Farm claim representative Linda Swagler. We affirm.

I.

In 1997, Linda Swagler, a State Farm claim representative, hired Silverman to represent her daughter in a medical-malpractice claim against a hospital. As the case proceeded, Swagler kept her supervisor at State Farm informed about its progress – and about her growing admiration for Silverman. According to her supervisor, Swagler's admiration verged on "hero-worship": "She described him as masterful at his work. She would say things like he's awesome, he's incredible. . . . [S]he spoke of him very, very highly, which I would expect if someone were doing a great job on a case, but I thought she took it to another level." JA 1833. In February 2000, Swagler's supervisor warned her that she should "let [him] know if [Silverman] should ever become involved with any of her files" because he thought a "conflict of interest existed between her and Mr. Silverman." JA 1836. In 2001, after Silverman obtained a $1.5 million settlement on behalf of Swagler's daughter, Swagler's supervisor repeated his warning, noting that if Silverman represented an individual against State Farm and Swagler handled the claim, "[i]t just would really, really look bad . . . knowing the history [they] ha[d]." JA 1838.

Nevertheless, over the next several years, Silverman represented at least nine individuals who had filed claims against State Farm, and Swagler worked as the case manager for State Farm on each claim. In 2005, after learning what had happened and after investigating the settlements in these cases,

the insurance company filed counterclaims against Silverman and Swagler in one of Silverman's pending diversity cases, alleging that the two of them had "methodically robbed State Farm of millions of dollars by causing State Farm to issue unjustified and excessive payments . . . either directly to Silverman or to injured persons . . . , who in turn, endorsed the payments over to Silverman," JA 315. State Farm premised its claims on fraud and fiduciary breach, and sought declaratory judgments voiding the settlement agreements obtained by Silverman for six of his clients.

Several of the claims were tried to a jury, which found against Silverman and Swagler on all counts and awarded damages of $4.2 million. The declaratory-judgment claims were tried to the court, which found in favor of State Farm on all counts and voided all six settlement agreements. The district court entered judgment in April 2007, and denied Silverman's motions for judgment as a matter of law and for a new trial. Silverman appealed, as did the six clients affected by the voided settlement agreements.

II.

A.

Silverman first argues that State Farm failed to present sufficient evidence of fraud. To show fraud under Michigan law, a plaintiff must establish (1) the existence of a knowing or reckless material

misrepresentation, (2) reliance and (3) injury. *Hord v. Envtl. Research Inst. of Mich.*, 617 N.W.2d 543, 546 (Mich. 2000).

The jury had ample grounds for finding Silverman responsible for several knowing and material misrepresentations. The record, as an initial matter, shows that Silverman himself made several misrepresentations: The court-appointed computer expert testified that Silverman backdated several of the settlement agreements between State Farm and his clients; a doctor testified that Silverman submitted a forged prescription for attendant care and supervision for his client; a care provider for one of Silverman's clients testified that Silverman instructed her to bill as if she had provided 24 hours of care per day, even though she agreed only to provide four to eight hours of care per day; and a State Farm case manager (who replaced Swagler) testified that Silverman misrepresented the claimant's previous need for 24-hour attendant care.

In view of Silverman and Swagler's collusive agreement, the jury also was permitted to hold Silverman responsible for Swagler's fraudulent statements. "Where there is evidence that parties are acting in collusion, [e]verything said, done, or written by any one of the parties to the combination, in furtherance of the common purpose, is deemed the act of all." *Kefuss v. Whitley*, 189 N.W. 76, 83 (Mich. 1922) (dealing with a claim to rescind a contract) (internal quotation marks omitted); *see also Kahn v. Friedman*, 45 N.W.2d 18, 19 (Mich. 1950); *Martinoff v. Jackson*

News Publ'g Co., 197 N.W. 576, 577 (Mich. 1924); *McDonald v. Smith*, 102 N.W. 668, 669-70 (Mich. 1905); *Gumberg v. Treusch*, 61 N.W. 872, 875 (Mich. 1895).

Silverman does not deny that Swagler made numerous fraudulent statements during the relevant years. He instead denies that the two of them colluded to defraud State Farm, maintaining that her misstatements therefore may not be used against him. Yet the frequency of the communications between Silverman and Swagler, well documented in the record, by itself suggests a contrary conclusion. Over two years, Swagler called Silverman almost 700 times. On November 20, 2003, the day State Farm auditors interviewed Swagler about several claimants for whom Silverman served as attorney, they spoke on the phone twelve times, including eight phone calls initiated by Silverman. Swagler even referred State Farm claimants to Silverman – which might have made some sense based solely on Silverman's successful representation of her daughter but made no sense given her job as a State Farm claim representative. *See* JA 1902 (a State Farm employee testifying that in her 20 years at State Farm, she had never known of anyone who had referred a claimant to an attorney). And of course all of this happened after Swagler was told by her supervisor not to work on claim files in which Silverman was involved.

Silverman, the record shows, also benefitted from Swagler's misrepresentations: State Farm often issued checks directly to Silverman, and Silverman

ensured that payment would continue to come directly to him by, for example, instructing a provider to send bills to him instead of sending them directly to State Farm, and arranging for the provider to be fired after she began billing State Farm directly. Even if Swagler, as the insider, made the vast majority of the fraudulent misstatements, Silverman knew what she was doing and benefitted directly from it. Having participated in the scheme and "accepted the fruit of the fraud," *Kefuss,* 189 N.W. at 83, he cannot disclaim responsibility for Swagler's actions.

Silverman insists that, "[w]ithout a scheme/conspiracy claim, there is no legal basis for using evidence about what Ms. Swagler said or did to hold Mr. Silverman vicariously liable." Br. at 40. But he cites no Michigan case for the proposition that a freestanding conspiracy claim is a precondition to imposing liability on Silverman for Swagler's actions. At least one Michigan case holds it is not, reasoning that the "concert of action theory does not depend on proving an independent claim of civil conspiracy. It requires evidence that parties knowingly acted to further a common purpose." *Korn Family Ltd. P'ship v. Harbor Bldg. Co.,* No. 272813, 2008 WL 239651, at *3 (Mich. Ct. App. Jan. 29, 2008). And other cases do not on their face involve underlying conspiracy claims. *See, e.g., Gumberg,* 61 N.W. at 875 ("There was evidence from which the jury might infer that the transactions were collusive, and the same rule is applicable as in a case where a conspiracy is charged, and there is evidence tending to establish it.

Everything said, done, or written by any one of the parties to the combination, in furtherance of the common purpose, is deemed the act of all.").

To the extent Silverman means to complain that he lacked notice that State Farm would use Swagler's misstatements against him, that is hard to take seriously. The essence of State Farm's allegation was that Silverman used Swagler, as a State Farm insider, to carry out the fraudulent scheme. The first paragraph of the counterclaim accuses Silverman and Swagler of engaging in a "scheme to defraud . . . for the sole purpose of enriching Silverman and Swagler, at the expense of State Farm, and in some instances, at the expense of Silverman's own clients and patients." JA 315. And to the extent he means to argue that the court should have given "a fraud conspiracy/scheme instruction," Br. at 40, he has not to this day explained the instruction that should have been given or what authority required it to be given, *see Leary v. Livingston County*, 528 F.3d 438, 449 (6th Cir. 2008). The overwhelming evidence of a conspiracy between them, at any rate, shows that any such error would have been harmless. *See United States v. Kuehne*, 547 F.3d 667, 681 (6th Cir. 2008).

State Farm also presented ample evidence of reliance and injury. Its damages witness testified at length about each of the payments that State Farm included in its total damage calculation, noting that the final damages figures "represent the difference between the monies State Farm paid to Mark Silverman and his clients and what State Farm

believes to be the maximum amount that [State Farm] would have paid, had Mark Silverman not been involved." JA 2100. For each payment included in the total damages calculation, the witness explained why the Silverman-Swagler scheme caused the insurance company to pay more than it should have.

For example: she noted that State Farm requested damages for two back payments that Swagler had issued despite the fact that "[t]here was no basis, no documentation, nothing to warrant payment of these two payments," JA 2105; that State Farm requested damages for an overpayment in continuing care for a claimant, explaining that "[t]here was support and documentation in the files" to justify the amount that had been provided for care before Silverman became involved but that "there was no documentation" to justify the increase that Swagler had paid after Silverman became involved, JA 2107; and that State Farm requested damages for back payments made in reliance on a fraudulent letter by Silverman indicating that one claimant was "horribly injured" and "needed back attendant care." JA 2114.

Silverman claims that the damages evidence "was based upon assumptions, not facts," Br. at 30, and that State Farm treated certain payments as "damages because they were made after Silverman became involved, not because Mr. Silverman made an intentional misrepresentation of fact," Br. at 31 (internal quotation marks omitted). Yet this is merely a reprisal of his argument, already rejected, that a

member of a fraudulent scheme does not have to answer for the fraudulent conduct of each member of the coordinated scheme. To the extent Silverman means to say there was no evidence of injury based on his assessment of the evidence regarding payments to three of his clients, that argument does nothing for him. State Farm presented evidence of injury tied to the claims of several other clients, and Silverman does not challenge these. Evidence of damages from even one misstatement suffices to establish the injury necessary to reject a sufficiency challenge to the fraud verdict.

B.

Silverman separately argues that he cannot be held liable for aiding and abetting Swagler's breach of fiduciary duty because Swagler's misconduct was in urging State Farm to "pay[ ] too much money" in a series of settlement agreements and Silverman had no duty to "avoid getting too good a deal" for his clients. Br. at 48. But there is a line between zealous representation and aiding and abetting fraud – which is why a lawyer may not use fraud to obtain a verdict or look the other way when he knows a client has testified falsely. *See Nix v. Whiteside*, 475 U.S. 157, 166 (1986) ("[C]ounsel's duty of loyalty and his overarching duty to advocate the defendant's cause . . . [are] limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client,

counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.") (internal quotation marks omitted); *People v. Atkins,* 243 N.W.2d 292, 299 (Mich. 1976). Nor was this merely an aiding and abetting of Swagler's negligence. State Farm's breach-of-fiduciary-duty counterclaim alleged that "Swagler's extensive and pervasive breach of her fiduciary duties to State Farm displays a high level of moral turpitude and wanton dishonesty." JA 417. The evidence at trial bore out this allegation. Among a long list of bad acts, Swagler falsified her log notes and attested to conversations with doctors that never happened.

In offering two case citations in support of this argument, Silverman gives analogy a bad name. *Friedman v. Dozorc,* 312 N.W.2d 585 (Mich. 1981), held that one party may not sue an opposing party's attorney "on a theory of negligence because an attorney owes no duty of care to an adverse party in litigation." *Id.* at 588. True enough, but State Farm accused Silverman of aiding and abetting a breach of fiduciary duty, not negligence, and *that* claim does not turn on a duty of care owed by Silverman to State Farm. *Reynolds v. Schrock,* 142 P.3d 1062 (Or. 2006), "h[e]ld that a lawyer may not be held jointly liable with a client for the client's breach of fiduciary duty unless the third party shows that the lawyer was acting outside the scope of the lawyer-client relationship." *Id.* at 1063. Silverman, however, was not Swagler's attorney, and *Reynolds* expressly does

not shield attorneys from liability for their fraudulent actions, *see id.* at 1069.

C.

Silverman next challenges several of the jury instructions. To obtain a new trial on this ground, he must show not only that there were "deficiencies" in the instructions but also that "the instructions, taken as a whole, [were] misleading or [gave] an inadequate understanding of the law." *Arban v. West Publ'g Corp.*, 345 F.3d 390, 404 (6th Cir. 2003).

He first complains about the "fail[ure] to disclose" instruction, JA 1639, which as he sees it authorized a verdict based on "fraud by omission," Reply Br. at 19. Silverman cites just one case in his opening brief in support of this argument, *see M&D, Inc. v. McConkey*, 585 N.W.2d 33 (Mich. Ct. App. 1998), and it deals only with the duty of sellers to disclose defects in their products, *id.* at 36. Why that case citation helps him is never explained. More fundamentally, he fails to account for the fact that "[i]n Michigan, even without a fiduciary relationship, a party is under a duty to use diligence in making a complete disclosure of facts where partial disclosure may convey false impressions and mislead the plaintiff. Such half-truths or non-disclosures are considered to be concealment of facts and, therefore, misrepresentations." *Strand v. Librascope, Inc.*, 197 F. Supp. 743, 753 (E.D. Mich. 1961). Silverman offers no reason why that requirement does not apply here, and it is particularly

difficult to imagine why a jury could not hold him responsible for failing to disclose Swagler's fraudulent behavior. As we have already explained, moreover, Silverman is liable for Swagler's failures, and he never challenges the application of the failure-to-disclose instruction to her actions.

He next claims that the damages instructions were misleading. The district court delivered one general damages instruction for all three charges, asking the jury to "determine the amount of money which reasonably, fairly, and adequately compensates State Farm for each of the elements of damage which you decide has resulted from the fraud, breach of fiduciary duty, or aiding and abetting breach of fiduciary duty, engaged in by the Counter-Defendants, taking into account the nature and extent of the injury," JA 1646. Silverman half-heartedly suggests that this instruction is only "for negligence claims," Br. at 51, but offers no explanation (or authority) why.

He separately insists that the court should have given instructions about aiding and abetting and fraud, but he provides no precedent in support of this argument either. It is unclear, in any event, how additional instructions would have helped him. Silverman suggests that the appropriate damages for fraud "are how much more was paid because the plaintiff relied upon a misrepresented fact to its detriment," Br. at 51, and State Farm requested damages according to the same "overpayment" calculation. *See* JA 2100 (testifying that the damages

calculations "represent the difference between the monies State Farm paid to Mark Silverman and his clients and what State Farm believes to be the maximum amount that [State Farm] would have paid, had Mark Silverman not been involved"). Because the jury accepted the damages figure proposed by State Farm, it is clear that they were not misled or influenced by the general jury instructions on damages – at least for the fraud claim. And because the jury could have awarded this entire amount as damages on the fraud claim, we need not review the propriety of the instructions for the aiding and abetting claim. *See Consenco Fin. Servicing Corp. v. N. Am. Mortgage Co.*, 381 F.3d 811, 823 (8th Cir. 2004).

He next challenges the charge on aiding and abetting a breach of fiduciary duty. In arguing that the instruction improperly omitted an element of the offense – that "the fiduciary and the aider/abetter profited" from the breach, Br. at 54 – Silverman cites a case that neither mentions nor requires that element. *See German Free State of Bavaria v. Toyobo Co.*, 480 F. Supp.2d 958, 965 (W.D. Mich. 2007). To our knowledge, there is no such requirement. Nor does it make any sense that there would be: Fiduciaries may readily – and quite egregiously – breach their duties of good faith without directly benefitting financially from the breach.

D.

Silverman next argues that the district court erred in denying his motion to amend or alter the judgment. *See* Fed. R. Civ. P. 59(e). We review the denial of a motion to amend or alter the judgment for abuse of discretion. *Nat'l Ecological Found. v. Alexander,* 496 F.3d 466, 476 (6th Cir. 2007). A court may grant a motion to alter or amend judgment only if there was "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson,* 428 F.3d 605, 620 (6th Cir. 2005). In arguing that there was an "error of law," Silverman places all of his eggs in an insufficiency-of-the-evidence argument, one we already have rejected, one we therefore need not discuss again.

E.

Silverman next argues that the district court should have compelled State Farm "to produce a prepared [Civil Rule] 30(b)(6) designee." Br. at 27. Under that discovery rule, an organization must designate an individual "to testify on its behalf . . . about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6). In May 2006, Silverman deposed State Farm's 30(b)(6) witness. At a hearing in July 2006, Silverman argued that the witness was not able to testify about what State Farm "would have had to pay" in these cases

absent the fraud. JA 1810. State Farm responded that it could not answer all of Silverman's questions, in part because Silverman had "never given [State Farm] any underlying backup data to show what care was provided to which individual, during which period." JA 1816. The judge noted that, "if [State Farm] get[s] that information before trial, they are required to notify" Silverman. JA 1818. In January 2007, five weeks before trial, State Farm provided additional information on this score, prompting Silverman to file a motion for sanctions, which the district court ultimately denied.

Granting for the sake of argument that Rule 30(b)(6) imposes a duty on a company to make a good-faith effort to identify and prepare its Rule 30(b)(6) witnesses, that does not help Silverman. State Farm's initial answer to Silverman's objection about why its witness could not answer all of the damages questions was a reasonable one, and the record simply offers no other hand-hold for maintaining that the district court abused its discretion in concluding that State Farm honored its discovery obligations.

Nor, for similar reasons, does the record support Silverman's allegation that State Farm engaged in "a pattern of deliberately concealing evidence" and that the district court abused its discretion by "allowing State Farm to offer evidence of damages." Br. at 29. Silverman has not shown that State Farm deliberately concealed evidence (or even that it could have delivered the information in its final interrogatory answer sooner than five weeks before trial),

confirming that the district court did not abuse its discretion in refusing to grant discovery sanctions. *See First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 510 (6th Cir. 2002).

F.

Silverman independently argues that the district court committed reversible error by refusing to admit evidence of a settlement agreement between State Farm and a non-party claimant whom Silverman had represented. The district court refused to admit the evidence because it was "a confidential settlement agreement," JA 2262, and because it was signed in 2006 – several years after the events at issue in this case. As Silverman sees it, the agreement would have "rebutted numerous theories" offered by State Farm, Br. at 33, because it showed that "other State Farm representatives did exactly what it was fraudulent for Ms. Swagler to do," Reply Br. at 12 – that other State Farm employees approved a large settlement agreement between State Farm and one of Silverman's employees. But he fails to come to grips with three realities. One, he never responds to one of the district court's explanations – that it was a 2006 agreement – and thus was made after the key events in this case and at a time when Silverman may have decided to reform his ways. Two, he fails to explain why a similar settlement agreement that was admitted at trial did not suffice to present this theory to the jury, making any error harmless. *See Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1330 (6th Cir.

1994). Three, the agreement by its terms purported to be confidential. No abuse of discretion occurred.

G.

Three of Silverman's clients – Tony Beard, Betty Davis and Raymond Andres – argue that, because they had claims pending against State Farm in Michigan state court, they should not have been added as counter-defendants to this case. Abuse-of-discretion review applies. *Travelers Indem. Co. v. Bowling Green Prof'l Assoc.*, 495 F.3d 266, 271 (6th Cir. 2007).

In addressing this argument, we consider "(1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a race for res judicata'; (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective." *Grand Trunk W. R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984).

In considering these factors, the district court made the following observations: Because the fraud claim involved the named counter-defendants, separate declaratory-judgment actions would duplicate, if not multiply, the presentation of the evidence;

because the damages requested in the fraud claim included only money that State Farm had *already* paid to Silverman and his clients, "the only way to get total relief is through a declaratory judgment" invalidating future payments under the agreement, R. 448 at 26; nullification of the settlement agreement would determine the rights of the clients in the state-court actions; and there was no evidence that State Farm was engaged in forum shopping. On balance, this reasonable assessment of the *Grand Trunk* factors does not amount to an abuse of discretion.

H.

Silverman makes several other arguments that repeat claims we have already rejected, that are unsupported or undeveloped, that were not raised below, or all of the above, and accordingly, we need not address them. *Leary*, 528 F.3d at 449.

III.

For these reasons, we affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

ROBERT RIVET, Plaintiff/Counter-Defendant v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Defendant/Counter-Plaintiff/Counter-Defendant, v. MARK L. SILVERMAN, MARK L. SILVERMAN, M.D., P.C., MARK L. SILVERMAN, M.D., J.D. P.C., LINDA S. SWAGLER, LINDA S. SWAGLER CONSULTING LLC, LORI ANDRES AS GUARDIAN FOR RAYMOND ANDRES, MELISSA DAVIS AS GUARDIAN FOR BETTY DAVIS, MARK PHILLIPS AS SUCCESSOR GUARDIAN FOR RAYMOND ANDRES, SONJA SCOTT, TRACEY SHURES AS GUARDIAN FOR JOHN SHURES, and RAMONA THOMAS AS GUARDIAN FOR JOHN GENTRIS, Counter-Defendants/ Counter-Claimants.	) No. 04-CV-72333) Chief Judge) Bernard A.) Friedman) Magistrate Judge) Steven D. Pepe

JUDGMENT ORDER

(Filed Apr. 19, 2007)

This matter coming before the Court for trial on Counter-Plaintiff State Farm's Counterclaims. The First, Second, and Third Counterclaims were tried to a jury. The Fourth through Eleventh Counterclaims were tried to the Court. The jury returned a verdict on each of the First, Second, and Third Counterclaims against each Counter-Defendant and returned a total damage award of $4.2 million. The jury allocated the damages award as follows: $2,940,000 (70%) against Counter-Defendant Mark L. Silverman; $630,000 (15%) against Counter-Defendant Mark L. Silverman M.D., J.D., PC; $210,000 (5%) against Counter-Defendant Mark L. Silverman M.D., PC; $378,000 (9%) against Counter-Defendant Linda Swagler. The jury found State Farm responsible for $42,000 (1%) of the $4.2 million verdict.

The Court being duly advised in the premises, Judgment is hereby entered and ordered in favor of Counter-Plaintiff State Farm Automobile Mutual Insurance Company and against each Counter-Defendant as follows:

As to the First Counterclaim for Fraud, the Second Counterclaim for Breach of Fiduciary Duty, and Third Counterclaim For Aiding and Abetting A Breach of Fiduciary Duty, the Court enters a judgment in favor of Counter-Plaintiff State Farm Automobile Mutual Insurance Company and against Counter-Defendant Mark L. Silverman in the amount

of $2,940,000; against Counter-Defendant Mark L. Silverman M.D., J.D., PC in the amount of $630,000; against Counter-Defendant Mark L. Silverman M.D., PC in the amount of $210,000; and against Counter-Defendant Linda Swagler in the amount of $378,000.

As to the Fourth Counterclaim for Unjust Enrichment, the Court dismisses the Counterclaim as moot, as per the record.

As to the Fifth Counterclaim for Breach of Fiduciary Duty, the Court denies the demand for injunctional relief against Linda Swagler and Linda Swagler Consulting, LLC, as per the record.

As to the Sixth Counterclaim for Declaratory Judgment, the Court enters judgment in favor of Counter-Plaintiff State Farm Automobile Mutual Insurance Company and against Counter-Defendant Robert Rivet and declares that the Agreement (trial exhibit #527) is null and void from inception.

As to the Seventh Counterclaim for Declaratory Judgment, the Court enters judgment in favor of Counter-Plaintiff State Farm Automobile Mutual Insurance Company and against Counter-Defendant Tracey Shures as Guardian for John Shures and declares that the Agreement (trial exhibit #1113) is null and void from inception.

As to the Eighth Counterclaim for Declaratory Judgment, the Court enters judgment in favor of Counter-Plaintiff State Farm Automobile Mutual Insurance Company and against Counter-Defendant

Sonja Scott and declares that the Agreement (trial exhibit #782) is null and void from inception.

As to the Ninth Counterclaim for Declaratory Judgment, the Court enters judgment in favor of Counter-Plaintiff State Farm Automobile Mutual Insurance Company and against Counter-Defendant Lori Andres, as former Guardian, and Mark Phillips, as Successor Guardian, and declares that the Agreement (trial exhibit #53) is null and void from inception.

As to the Tenth Counterclaim for Declaratory Judgment, the Court enters judgment in favor of Counter-Plaintiff State Farm Automobile Mutual Insurance Company and against Counter-Defendant Ramona Thomas as Guardian for John Gentris and declares that the Agreement (trial exhibit #454) is null and void from inception.

As to the Eleventh Counterclaim for Declaratory Judgment, the Court enters judgment in favor of Counter-Plaintiff State Farm Automobile Mutual Insurance Company and against Counter-Defendant Melissa Davis as Guardian for Betty Davis and declares that the Agreement (trial exhibit #270) is null and void from inception.

It is further ordered that Counter-Plaintiff State Farm Automobile Mutual Insurance Company is barred from seeking any damages from Counter-Defendants Robert Rivet; Tracey Shures, as Guardian for John Shures; Sonja Scott; Lori Andres, as former Guardian, and Mark Phillips, as successor Guardian,

for Raymond Andres; Ramona Thomas, as Guardian for John Gentris; and Melissa Davis, as Guardian for Betty Davis, for any monies paid pursuant to these null and void agreements.

It is further ordered that Counter-Plaintiff State Farm Automobile Mutual Insurance Company shall be entitled to costs, attorney fees and interest, according to law.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
CHIEF UNITED STATES
DISTRICT JUDGE

Dated: April 19, 2007
Detroit, Michigan

I hereby certify that a copy of the foregoing document was served this date upon counsel of record electronically and/or via first-class mail.

/s/ Patricia Foster Hommel
Patricia Foster Hommel
Secretary to Chief Judge
Friedman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT RIVET,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Defendant. /

Civil Action No. 04-CV-72333-DT

HON. BERNARD A. FRIEDMAN

ORDER DENYING SILVERMAN COUNTER-DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW (DKT. NO. 356)

and

DENYING SILVERMAN COUNTER-DEFENDANTS' MOTION FOR NEW TRIAL (DKT. NO. 357)

(Filed Jun. 28, 2007)

On June 27, 2007, this matter came before the Court on Silverman Counter-Defendants' (1) Renewed Motion for Judgment as a Matter of Law and (2) Motion for New Trial. A hearing was held and oral argument heard. For the reasons stated on the record,

IT IS ORDERED that Silverman Counter-Defendants' Renewed Motion for Judgment as a Matter of Law is denied.

IT IS FURTHER ORDERED that Silverman Counter-Defendants' Motion for New Trial is denied.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
CHIEF UNITED STATES
DISTRICT JUDGE

Dated: June 28, 2007
Detroit, Michigan

I hereby certify that a copy of the foregoing document was served this date upon counsel of record electronically and/or via first-class mail.

/s/ Patricia Foster Hommel
Patricia Foster Hommel
Secretary to Chief Judge Friedman

Case No. 07-1864

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

ROBERT RIVET

Plaintiff

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Defendant/Counter-Plaintiff-Appellee

MARK L. SILVERMAN; et al.

Counter-Defendants-Appellants

BEFORE: MERRITT, COLE, and SUTTON, Circuit Judges.

Upon consideration of appellants' motion for reconsideration of the Court's decision,

It is **ORDERED** that the motion be, and it hereby is, **DENIED**.

ENTERED BY ORDER
OF THE COURT
Leonard Green, Clerk
/s/ Leonard Green

Issued: April 01, 2009

Supreme Court, U.S.
FILED
AUG 27 2009
OFFICE OF THE CLERK

No. 09-17

IN THE
Supreme Court of the United States

MARK L. SILVERMAN, *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari where Petitioners' sole arguments are that the District Court erred by: (1) denying Petitioners' motion for summary judgment premised on a purported lack of damages, although the jury subsequently returned a $4.2 million verdict for State Farm, which was affirmed by the Sixth Circuit; (2) sustaining State Farm's objection to the admission of a state court transcript reflecting the terms of a confidential settlement agreement from an unrelated case; and (3) not giving a jury instruction on conspiracy, although no such claim was asserted against Petitioners, nor were Petitioners held liable under any such theory.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29(6), Respondent State Farm Mutual Automobile Insurance Company ("State Farm") states as follows:

State Farm does not have any parent corporations and no publicly held corporation owns 10% or more of the State Farm's stock.

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INTRODUCTION

Petitioners' Petition for Writ of Certiorari ("Petition" or "Pet.") should be denied because they fail to present a single "compelling reason" for granting certiorari. Rather, they have presented three purported errors: the denial of summary judgment, the exclusion of a single piece of evidence, and the failure to give a conspiracy instruction. Each of these bases constitutes nothing more than an alleged misapplication of a properly stated rule of law.

First, Petitioners contend that the District Court erred by denying their motion for summary judgment, in which they argued that State Farm could not prove any damages. The jury, however, clearly disagreed with Petitioners when it awarded State Farm $4.2 million. Additionally, the Sixth Circuit, along with every other United States Court of Appeals that has considered the issue, correctly held that Petitioners cannot challenge the denial of summary judgment on appeal after losing after a full trial on the merits. Moreover, six out of eleven counts were for declaratory judgments and did not even involve the question of damages.

Second, Petitioners argue that the District Court erred by excluding a confidential hearing transcript from a completely unrelated state court case. Petitioners make this argument despite the following facts: (1) the transcript involved an unrelated settlement in a state court case that was irrelevant to the claims at trial because the settlement was reached three years after the relevant events in this case, (2) the settlement was confidential, and (3) the inadvertence of the parties and

state court was the sole reason the transcript was mistakenly not sealed.

Finally, Petitioners contend that the District Court erred by refusing to instruct the jury on conspiracy, arguing that they could not be held liable for the misrepresentations and omissions of their co-defendant, Linda Swagler, without such an instruction. However, State Farm did not bring a conspiracy claim against Petitioners, and Petitioners were not found liable under a conspiracy theory. Rather, after being instructed on the relevant claims and theories of liability, the jury expressly found in special interrogatories that each Petitioner was liable for fraud based upon his or its own material misrepresentations and omissions, thus rendering moot the dispute about whether a conspiracy instruction should have been given.

These alleged District Court errors do not present "compelling reasons" for this Court to grant certiorari. Moreover, although Petitioners appear in passing to invoke the Court's "supervisory power" (*see* Pet. at 6), Petitioners do not and cannot explain the manner in which the District Court "so far departed from the accepted and usual course of judicial proceedings" as to render this case worthy of the Court's consideration. Nor do Petitioners point to a circuit split, conflict with a holding of a state's highest court, an important federal question that remains unresolved by the Court, or a conflict with a prior Supreme Court holding.

This Court has repeatedly stated that it will not grant certiorari "for the benefit of the particular litigants." *See Rice v. Sioux City Mem'l Park Cemetery*,

Inc., 349 U.S. 70, 74 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); Sup. Ct. R. 10. Rather, this Court will only hear cases for "compelling reasons" that go well beyond the case at hand. *Id.*

Indeed, this case is devoid of any unusual, novel, or significant issue of state or federal law. Petitioners' arguments constitute nothing more than a rehash of issues thoroughly considered, and properly rejected, by Chief Judge Bernard A. Friedman during and after the trial, and then by the Sixth Circuit, first in its detailed opinion affirming the verdict and then in its opinion denying reconsideration. In short, the types of errors alleged in the Petition do not present a sufficient basis to warrant this Court's review. Therefore, Respondent respectfully requests that this Court deny Petitioners' request for a writ of certiorari.

STATEMENT OF THE CASE

The Scheme to Defraud

From approximately September 2001 to November 2003, Petitioners engaged in a scheme with State Farm insurance adjuster Linda Swagler ("Swagler") to steal millions of dollars from State Farm through a complex fraud scheme (the "Scheme"). Pursuant to the Scheme, Swagler, a 30 year employee who handled only claims involving catastrophic injuries, secretly steered nine insureds ("Insureds"), whose claims she personally handled, to Petitioner Mark Silverman ("Silverman"), who is a personal injury attorney and psychiatrist. Silverman proceeded to provide psychiatric services to some of the Insureds, and to represent all the Insureds in their injury claims against State Farm.

Acting in concert, Silverman and Swagler manipulated the information and documents in these claim files to conceal from Swagler's State Farm supervisors: (1) that Silverman was representing and treating the Insureds, (2) significant settlements that Swagler entered into with Silverman regarding the Insureds' claims, and (3) information regarding the Insureds' claims that would have undermined the purported bases upon which Swagler's settlements with Silverman were made. Furthermore, Silverman and Swagler created false documents that were designed to induce Swagler's State Farm supervisors to approve large settlements with Silverman. Finally, Silverman and Swagler manufactured and backdated written settlement agreements (the "Fraudulent Settlements") that purported to obligate State Farm to pay millions of dollars to six Insureds in the future. To avoid detection, during discovery Silverman arranged to have the Fraudulent Settlements and related "metadata" deleted from his computer hard drive. Moreover, during the trial and shortly before producing an external hard drive which had been copied from his computer, Silverman arranged to further manipulate the metadata relating to the Fraudulent Settlements. Every aspect of the Scheme was intended to enrich Silverman at State Farm's expense, and often at the expense of Silverman's own clients.

Specifically, Silverman and Swagler worked together to:

- misrepresent the past and current medical conditions of the Insureds;

- misrepresent the past and current care provided to the Insureds;

- misrepresent to State Farm supervisors that Swagler had purportedly received authority to make payments or settle claims from other supervisors or legal counsel;

- conceal Silverman's involvement as the Insureds' attorney or psychiatrist;

- ignore and waive the rule in Michigan that the Insureds' claims needed to be filed within one year from when expenses were incurred;

- make significant payments to Silverman without requesting or receiving supervisory authority;

- manipulate reserves to facilitate increased payments;

- misrepresent to supervisors the amounts Swagler had paid or committed to pay to Silverman and the Insureds;

- manufacture and backdate the Fraudulent Settlements;

- conceal key medical records and other documents from State Farm's claim files which would have disclosed the Scheme; and

- make approximately 1,500 phone calls to each other during the two-year Scheme, many of which were made around key events of the Scheme.

As a result of the Scheme, State Farm paid $4.2 million of benefits that were not owed, and more than $1.7 million of those amounts went to Silverman for his attorney's fees or psychiatry charges.

The Scheme Is Uncovered

On November 20, 2004, after discovering irregularities in the Insureds' claim files, State Farm auditors attempted to interview Swagler. During this interview, Swagler denied any improprieties and ended the interview abruptly by walking out and resigning from State Farm effective immediately. Telephone records establish that Swagler and Silverman initiated 12 calls to each other during breaks from the interview, and over the following weekend, they called each other another 11 times and spoke for several hours.

Following Swagler's resignation, State Farm declined to honor the Fraudulent Settlements because it: (1) was unaware of and had never authorized most of them; and (2) had been duped into authorizing the others based upon misinformation from Silverman and Swagler. As discussed next, Silverman then attempted to enforce the Fraudulent Settlements by filing lawsuits against State Farm, alleging that the Fraudulent Settlements were valid and that State Farm was obligated to make payments pursuant to them.

The Lawsuit and Counterclaims

From approximately March 2004 to June 2004, Silverman filed a series of individual lawsuits on behalf of the Insureds against State Farm to enforce the Fraudulent Settlements. These lawsuits included a Complaint that Silverman filed on May 28, 2004, on behalf of Insured Robert Rivet (the "Rivet claims"). On June 23, 2004, State Farm removed the Rivet claims to federal court, and on July 5, 2005, the District Court granted State Farm leave to file counterclaims (the "Counterclaims") against Swagler and Silverman, his legal PC, and his psychiatric PC (collectively referred to as "Petitioners").

Count One of the Counterclaims alleged common law fraud against Swagler and the Petitioners under Michigan law. Count Two alleged breach of fiduciary duty against Swagler under Michigan law. Count Three alleged aiding and abetting a breach of fiduciary duty against Petitioners under Michigan law. (Counts Four and Five are not relevant to this appeal.) Counts Six through Eleven sought declaratory judgments that the six Fraudulent Settlements had been fraudulently procured and were therefore null and void. Because these Insureds claimed an interest in the Fraudulent Settlements, they and/or their guardians were named as counter-defendants in Counts Six through Eleven under Federal Rule of Civil Procedure 19. State Farm sought monetary damages from only the Petitioners and Swagler, not from the Insureds, who were named solely as interested and necessary parties to the declaratory judgment claims.

The District Court had jurisdiction over each of these counterclaims under 28 U.S.C. § 1332(a)(1).

The Trial; Destruction of Evidence

From March 5 to April 17, 2007, State Farm tried Counts One through Three of its Counterclaims to the jury. Counts Six through Eleven, the declaratory judgment claims, were tried to the Honorable Bernard A. Friedman, then the Chief Judge of the Eastern District of Michigan.[1]

During trial, State Farm called medical doctors, nurses, case managers, Swagler's supervisors, an in-house lawyer, and, for eight days of testimony, Silverman and Swagler themselves.

Seven doctors (Kerner, Pearlman, Moylan, Pelshaw, Hinderer, Neishoff, and Benjamins) testified that Swagler's log notes regarding what they had purportedly stated about the Insureds' medical conditions and needs were false, either because the conversations Swagler described never happened or because the doctors' actual statements were the opposite of what Swagler wrote in the claim file.

In other instances, the doctors testified that prescriptions described by Silverman in correspondence to State Farm and by Swagler in her claim file log notes had never been written, and that aspects of their reports had been completely misrepresented by Swagler to her supervisors. For example, Dr. Denyce Kerner, a licensed psychologist specializing for 30 years in neuropsychology, testified that she had informed Swagler that Insured

1. Rivet's claim against State Farm was bifurcated and later settled.

John Shures needed to receive only 6 hours per day of "supervision." Swagler, however, informed her State Farm supervisors that Dr. Kerner felt that Shures needed 24-hours-per-day of higher level "attendant care."

State Farm also proved that Silverman and Swagler repeatedly fired the Insureds' health care providers when they refused to provide false prescriptions or reports, or when they would have been in a position to contravene false information that Silverman and Swagler were using to dupe Swagler's supervisors. For example, Silverman and Swagler terminated three highly qualified doctors, Drs. Pelshaw, Hinderer, and Nieshoff, all of whom were deeply committed to the Insureds' care, because they refused to prescribe 24 hours per day of attendant care that was not needed. Similarly, Silverman and Swagler fired medical case managers Sandy Trout from the Shures file; Rita Ingersoll from the Scott file; Health Partners from the Vaughn file; and Rita Ingersoll and Donna Rogers from the Gentris file. These medical case managers were fired because they were in a position to know that the information that Silverman and Swagler were communicating to State Farm supervisors regarding the conditions and needs of the Insureds was false.

As the Scheme unraveled, Silverman created and backdated the Fraudulent Settlements on his computer. The Fraudulent Settlements purported to commit State Farm to pay millions of dollars in benefits that were not actually owed over many years into the future. Most of the Fraudulent Settlements had never been shown to or approved by a supervisor; never appeared in Swagler's log notes contemporaneous to when they

were purportedly entered; were never contemporaneously placed in the imaged-documents claim files; and were for time periods well in excess of State Farm's standard agreements. The Fraudulent Settlements did not contain the required releases from the Insureds, and the agreements wholly favored the Insureds in that benefits could increase if circumstances changed, but they could never decrease.

At trial, State Farm established that the day before a court-appointed computer forensic expert downloaded the hard drive from Silverman's computer, an attempt had been made to delete the Fraudulent Settlements and related "metadata" from the computer. Furthermore, during the trial, Silverman was ordered to produce an external copy of the hard drive of his computer. The evidence established that the metadata on that external drive was manipulated after the trial began and before the drive was produced.

With respect to the withholding of and tampering with this key computer evidence, Judge Friedman specifically held:

> The Court believes that Mr. Silverman was in contempt . . . I think it's unequivocal that he violated a court order by not turning over the external drive in a timely fashion when he had the drive, when it was at his location . . . There's no question about it that that was in contempt of court, it was in direct violation of this court's order . . . I [also] think it was in direct violation of this court's order that he

> manipulated or caused to be manipulated his computer . . . I can't say he did it himself, but he at least caused, he was part of the scheme to do so. And even more acute that he was part of that scheme to do it during this trial when he was supposed to turn that external drive over. . . [H]e directly violated this court's order will fully, wantonly and knowingly.

The Verdicts

On April 17, 2007, in less than four hours of deliberation, the jury rendered a unanimous verdict for State Farm on each count, answering each of 27 special interrogatories in favor of State Farm, including interrogatories that Silverman, his Legal PC, and his Psychiatric PC each intentionally made material misrepresentations and omissions that proximately caused State Farm's damages. The jury then awarded State Farm $4.2 million in damages.

On April 19, 2007, Judge Friedman held that the Fraudulent Settlements were null and void because they had been procured by fraud. In fact, Judge Friedman concluded that State Farm had proved fraud by clear and convincing evidence, and further stated that "if this were a criminal case the court would have no hesitation whatsoever" in finding the Petitioners and Swagler guilty "beyond a reasonable doubt." Judge Friedman described several documents and log entries in the claim files that the Petitioners and Swagler had used to effectuate the Scheme as "false and misleading and totally fabricated." He found that the Fraudulent Settlements had been fabricated and "procured as a

result of the wrongful, illegal Scheme between Silverman and Swagler" and that these agreements were never "approved or authorized by State Farm."

Judge Friedman subsequently entered a Final Judgment Order and denied Petitioners' motions for a new trial and for judgment notwithstanding the verdict. Petitioners appealed to the Sixth Circuit. On March 12, 2009, the Sixth Circuit affirmed the jury's verdict and Judge Friedman's verdict in their entirety, rejecting the Petitioners' nine points of error. On April 1, 2009, the Sixth Circuit panel denied Petitioners' request for a rehearing.

REASONS FOR DENYING THE PETITION

I. THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT IS NOT REVIEWABLE AFTER A JURY VERDICT; THE DISTRICT COURT CORRECTLY DENIED SUMMARY JUDGMENT; AND, THIS ASSERTED POINT OF ERROR IS NOT A BASIS FOR THIS COURT TO GRANT CERTIORARI.

Petitioners seek a writ of certiorari so that this Court may review the District Court's denial of Petitioners' summary judgment motion on the ground that State Farm did not respond to that motion with sufficient admissible evidence regarding its damages. The District Court rejected this argument, concluding that questions of material fact with respect to damages "abound." The Sixth Circuit declined to review this denial of summary judgment because the law is well-established that a District Court's denial of a summary

judgment motion is not reviewable on appeal where the movant has later lost after a full trial on the merits. *See Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *Paschal v. Flagstar Bank*, 295 F.3d 565, 571 (6th Cir. 2002); *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 441 (6th Cir. 2005); *Shohadaee v. Metro. Gov't of Nashville & Davidson County*, 150 Fed. Appx. 402, 403-04 (6th Cir. 2005).

The foregoing cases explain that even assuming an error in the denial of summary judgment, the potential injustice of allowing the improper denial of the motion is outweighed by the actual injustice of depriving a party of a jury verdict after the evidence has been fully presented. *See, e.g., Paschal*, 295 F.3d at 571.[2]

The only exception to this rule – where the denial of summary judgment turns on an issue that is "purely one of law" (*Paschal*, 295 F.3d at 571) – is inapplicable

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2. Every Circuit Court of Appeals to consider this issue has reached the same conclusion, including the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits. *See Lama v. Borras*, 16 F.3d 473, 477 (1st Cir. 1994); *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 130 (2nd Cir. 1999); *Varghese v. Honeywell Intern., Inc.*, 424 F.3d 411, 421 (4th Cir. 2005); *Black v. J.I. Case Co., Inc.*, 22 F.3d 568, 571 (5th Cir. 1994); *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 277 (7th Cir. 1994); *Metro. Life Ins. Co. v. Golden Triangle*, 121 F.3d 351, 354 (8th Cir. 1997); *Locricchio v. Legal Serv. Corp.*, 833 F.2d 1352, 1358-59 (9th Cir. 1987); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250 (10th Cir. 1992); *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1344 (11th Cir. 2000); *Robinson v. Garrett*, 966 F.2d 702, 702 (D.C. Cir. 1992); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573-74 (Fed. Cir. 1986).

here, because the sole basis for Judge Friedman's ruling was that "questions of material fact abound." Thus, the Sixth Circuit committed no error in applying this well-established rule to the circumstances of this case.

Petitioners do not ask this Court to review this unanimous rule of law, nor could they since there is no circuit split on the issue. Rather, Petitioners appeal to the fact that there is no express statutory provision or prior decision of this Court to prohibit appellate review of the denial of their summary judgment motion. However, this does not satisfy Petitioners' burden to present a *compelling reason* why the Court should review the Sixth Circuit's decision declining appellate review of the summary judgment denial.

Setting aside the impropriety of reviewing the denial of a motion for summary judgment where the movant subsequently loses at trial, the District Court correctly concluded on summary judgment that Petitioners had not met their burden of establishing that there were *no disputed issues of material fact*. *See* Fed. R. Civ. P. 56(c); *see also Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) ("[T]he purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."). Indeed, the District Court correctly concluded that genuine issues of material fact existed as to damages, and the jury verdict resolved those issues by awarding State Farm damages of $4.2 million. Thus, the motion for summary judgment was properly denied.

Finally, regardless of whether these motions were properly or improperly denied, this Court has repeatedly

stated that its charge is not to fix the errors of every individual trial, but rather to take cases that present compelling reasons for their consideration, cases involving federalism, executive power, constitutional rights, statutory construction, and the like. *See* Robert L. Stern, Supreme Court Practice 222-25, 249-52 (8th ed. 2002). Such is clearly not the case here.

II. THE DISTRICT COURT CORRECTLY EXCLUDED A SETTLEMENT HEARING TRANSCRIPT FROM AN UNRELATED CASE; EVEN IF ERRONEOUS, THE FAILURE TO ADMIT THIS EVIDENCE IS NOT A BASIS FOR THIS COURT TO GRANT THE WRIT.

Petitioners also ask this Court to grant certiorari to correct the District Court's alleged error in refusing to admit a single settlement hearing transcript from a case unrelated to the case before the District Court. This transcript was from a state court hearing, during which State Farm and another Silverman client who was not a party to this case, Rachel Apostolopolous, presented on the record a confidential settlement agreement that they had reached three years after Swagler left State Farm (the "Apostolopolous Settlement" and "Apostolopolous Settlement Transcript").

The District Court refused to admit the Apostolopolous Settlement Transcript on two grounds. First, the court excluded the Apostolopolous Settlement Agreement for reasons that fit within the parameters of Federal Rules of Evidence 402 and 403, ruling that it was irrelevant to the issues before the court and jury

because the settlement was not entered and signed until 2006 – several years after the events at issue in the instant case. Second, the court sustained State Farm's objection because the transcript contained the terms of "a confidential settlement agreement" that the parties and their attorneys (including Silverman himself) had agreed to keep confidential, but which had remained unsealed solely through an administrative failure to have the transcript sealed.

Petitioners asserted at trial, in their appeal to the Sixth Circuit, and in their Petition, that the terms of the Apostolopolous Settlement set forth in the transcript would have "rebutted numerous theories" offered by State Farm, by showing that "other State Farm representatives did exactly what it was fraudulent for Ms. Swagler to do," which was to "approve a large settlement agreement between State Farm and one of Silverman's clients." The Sixth Circuit rejected this argument, finding that no abuse of discretion occurred in excluding the transcript, and further holding that even if it were error to exclude the transcript, any such error was harmless because the same theory had been fully presented to the jury using similar evidence, and that argument was ultimately rejected by the jury.

There are at least four reasons this Court should not grant certiorari on this question. First, both the District Court and Sixth Circuit were correct in concluding that the Apostolopolous Settlement Transcript was irrelevant. The District Court correctly held that the December 2006 Apostolopolous Settlement Agreement was not relevant to a Scheme that took place between September 2001 and November 2003. The

Sixth Circuit affirmed, in part, on this very point. Moreover, the circumstances that led to the Apostolopolous Settlement Agreement in 2006 were different than the circumstances which led to the Fraudulent Settlements, such that the terms of the Apostolopolous Settlement Agreement simply did not make the issue of whether Silverman and Swagler engaged in a Scheme to defraud in 2001 to 2003 "more or less likely."[3]

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3. Petitioners now contend that "State Farm alleged in the counterclaim that the Apostolopolous settlement was part of the scheme to defraud State Farm." (Pet. at 30.) This is false and mischaracterizes State Farm's Counterclaims. Specifically, it would have been impossible for State Farm to allege in its Counterclaims, which were filed in July 2005, that a settlement agreement not reached until December 2006 was part of the Scheme which took place from 2001 to 2003.

State Farm did, however, refer to Rachel Apostolopolous in its July 2005 Counterclaims, alleging that "[a]s part of the Scheme, Swagler improperly referred, directly or indirectly, certain Insureds to Silverman to be their attorney, including but not limited to Rachel Apostolopolous . . . and Michael Dowidait," and that "Swagler also provided Silverman with confidential information about the Apostolopolous and Dowidait files, on which she was the claim representative, prior to Silverman's involvement." (Counterlcaims ¶¶ 215 and 316(b).) Although Apostolopolous later became a client of Silverman, Swagler was confronted with the fraud Scheme and resigned before she and Silverman were able to manipulate the Apostolopolous file. While the Counterclaims indicated that the steering of Rachel Apostolopolous to Silverman as a client and providing him with confidential information about her were both originally part of the Scheme, by the time the Pretrial Order was filed and the trial held, the Apostolopolous file was not part of the case. This Court should reject Petitioners' clearly false statement that State Farm alleged that the Apostolopolous Settlement was part of the scheme to defraud.

Second, the Apostolopolous Settlement Agreement was clearly marked confidential by the parties and their counsel, including Silverman, who represented Apostolopolous in the settlement. Silverman was named as a counter-defendant in July 2005, and therefore, knew when he signed the confidentiality agreement in December 2006 that he would not later be able to use it at his own trial. Indeed, during argument on the admissibility of the transcript, Silverman himself expressly conceded that he was bound by the confidentiality provisions in the Apostolopolous Settlement Agreement.

The sole basis on which he and his counsel attempted to admit the terms of the Apostolopolous Settlement into evidence was the parties' administrative failure to have the court seal the settlement hearing transcript. Judge Friedman was correct when he concluded that the parties' inadvertent failure to seal the transcript in the state court case was not a basis to overturn the parties' intent regarding confidentiality. Specifically, Judge Friedman stated, "We are not here to play games . . . . [A] mistake may have been made that it was not sealed but as an officer of the Court I think you have a duty . . . not to disclose it." The Sixth Circuit agreed.

Third, even if the exclusion was error (which it was not for the reasons stated above), such error was harmless because Petitioners successfully moved the admission of another settlement agreement that had been entered into between a State Farm representative and Silverman in a different, unrelated claim. Petitioners were permitted to argue to the jury that this other settlement agreement proved the same theory that they

sought to make about the Apostolopolous Settlement Agreement. The jury, however, clearly rejected the argument. On appeal, the Sixth Circuit correctly held that, "[Silverman's failure] to explain why a similar settlement agreement that was admitted at trial did not suffice to present this theory to the jury, making any error harmless." (Citing *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1330 (6th Cir. 1994).)

Fourth, this claim of error – that a single piece of evidence was excluded – in a case where the jury and judge, after hearing seven weeks of evidence, overwhelmingly found that the Petitioners engaged in fraud, simply does not present this Court with a "compelling reason" to grant certiorari. This Court has long held that because the trial judge "sits in the arena of litigation," he or she "has, and must have, broad discretion in the conduct of a trial. Rulings on the relevancy and materiality of evidence may not be disturbed on appeal in the absence of a showing of clear abuse of discretion." *Hamling v. United States*, 418 U.S. 87, 126 (1974); *see also Geisler v. Folsom*, 735 F.2d 991, 997 (6th Cir. 1984). Indeed, "[a] district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules. Assessing the probative value of [the proffered evidence], and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403 . . . ." *United States v. Abel*, 469 U.S. 45, 54 (1984); *see also Tompkin v. Philip Morris USA, Inc.*, 362 F.3d 882, 897 (6th Cir. 2004).

For all these reasons, the Court should deny the writ.

III. THE DISTRICT COURT CORRECTLY REJECTED A CONSPIRACY INSTRUCTION BECAUSE CONSPIRACY WAS NOT PLED; THIS ALLEGED ERROR WAS WAIVED IN THE COURT BELOW; THE COURT OF APPEALS DID NOT AFFIRM THE FRAUD COUNTS ON GROUNDS OTHER THAN THOSE PLED; AND EVEN IF IT WAS NOT WAIVED, OR IF THE DECISION WAS ERRONEOUS, THE ERROR PETITIONERS NOW ALLEGE IS NOT A BASIS FOR THIS COURT TO GRANT CERTIORARI.

Petitioners assert that the jury found them "vicariously liable for what Ms. Swagler had said or done while at State Farm," and then argue that when they raised this issue on appeal, the Sixth Circuit affirmed the verdict "based upon a claim [of conspiracy] that was never submitted to the jury." Pet. at 16, 17. Petitioners conclude that "by affirming the district court judgment on legal theories that was [sic] never pled, litigated, or decided by a jury, the court of appeals violated [Petitioners'] due process rights." Pet. at 19. Petitioners are wrong for several reasons.

"In considering the correctness and adequacy of a charge to the jury, it should be taken as a whole and read in its entirety." *See United States v. Birnie*, 193 F. App'x 528, 537 (6th Cir. 2006) (citing *Nolan v. Greene*, 383 F.2d 814, 816 (6th Cir. 1967)). "'A district court's refusal to deliver a requested instruction is reversible error only if the instruction (1) is a correct statement of

the law, (2) is not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense.'" *Id.* (quoting *United States v. DeSantis*, 134 F.3d 760, 768 (6th Cir. 1998)). Petitioners cannot satisfy these requirements.

To begin, State Farm did not allege a conspiracy claim, nor did the jury find Petitioners liable for conspiracy. State Farm did, however, allege that Petitioners and their co-defendant, Swagler, defrauded State Farm. The District Court gave thorough instructions on State Farm's fraud claim, including an instruction for each of the following: (1) material misrepresentations, (2) material omissions, (3) to explain that fraud can be proven by either material misrepresentations or omissions, (4) to explain materiality, and (5) to explain reliance. Petitioners do not challenge the propriety of the detailed instructions that the District Court actually gave the jury on State Farm's fraud claim.

Moreover, contrary to Petitioners' contention, the jury did not find Petitioners vicariously liable for Swagler's misrepresentations and omissions to State Farm. Rather, during the trial, State Farm proved that Petitioners' *own* intentional misrepresentations and omissions, *taken alone*, were sufficient to establish their liability for common law fraud. Indeed, at Silverman's insistence, the jury was provided with the following special interrogatories, pursuant to which it concluded that each of the Petitioners had personally

made material misrepresentations and omissions by answering "Yes" to each:

Question 1.	Do you find, by clear and convincing evidence, that Mark Silverman committed fraud by misrepresentation?
Question 3.	Do you find, by clear and convincing evidence, that Mark Silverman, M.D., P.C. committed fraud by misrepresentation?
Question 5.	Do you find, by clear and convincing evidence, that Mark Silverman, M.D., J.D., P.C. committed fraud by misrepresentation?
Question 9.	Do you find, by clear and convincing evidence, that Mark Silverman committed fraud by failing to disclose material facts?
Question 11.	Do you find, by clear and convincing evidence, that Mark Silverman, M.D., P.C. committed fraud by failing to disclose material facts?
Question 13.	Do you find, by clear and convincing evidence, that Mark Silverman, M.D., J.D., P.C. committed fraud by failing to disclose material facts? [4]

4. In addition to these findings, the jury also found that "State Farm was damaged as a result of" the misrepresentations and omissions that the Silverman Petitioners made. (Questions 2, 4, 6, 10, 12, 14.)

Consistent with these jury findings, Judge Friedman separately and independently concluded that Silverman had fabricated and backdated the Fraudulent Settlements and created other documents that were "false and misleading and totally fabricated." The Sixth Circuit then summarized some of the evidence that established Silverman's personal material misrepresentations and omissions as follows:

> The jury had ample grounds for finding Silverman responsible for several knowing and material misrepresentations. The record, as an initial matter, shows that Silverman himself made several misrepresentations: The court-appointed computer expert testified that Silverman backdated several of the settlement agreements between State Farm and his clients; a doctor testified that Silverman submitted a forged prescription for attendant care and supervision for his client; a care provider for one of Silverman's clients testified that Silverman instructed her to bill as if she had provided 24 hours of care per day, even though she agreed only to provide four to eight hours of care per day; and a State Farm case manager (who replaced Swagler) testified that Silverman misrepresented the claimant's previous need for 24-hour attendant care.

Accordingly, Petitioners' argument regarding the District Court's refusal to instruct the jury on conspiracy is based entirely on the false premise that the jury found Petitioners vicariously liable for Swagler's

misrepresentations and omissions. Thus, their contention that the Sixth Circuit erred by affirming the verdicts of the judge and jury under a "concert of action" or "collusive agreement" theory is moot and simply not a basis for this Court to grant certiorari.[5]

Finally, this alleged point of error, even if established, was harmless. The Sixth Circuit went into

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5. Even if the jury had found Petitioners liable for the misrepresentations and omissions of Swagler, their co-schemer, such a finding would have been proper. As the Sixth Circuit concluded, "[i]n view of Silverman and Swagler's collusive agreement, the jury was also permitted to hold Silverman responsible for Swagler's fraudulent statements." Under well-established Michigan law, no freestanding claim of "conspiracy" is necessary in order for a jury to apply the principle that "any defendant who knowingly participates in fraud is responsible for false representations made by others in furtherance of that scheme." *See Kefuss v. Whitley*, 189 N.W. 76, 83 (Mich. 1922) (relied upon by Sixth Circuit in affirming verdict); *Kahn v. Friedman*, 45 N.W.2d 18, 19 (Mich. 1950); *Martinoff v. Jackson News Pub. Co.*, 197 N.W. 576, 577 (Mich. 1924) (same); *McDonald v. Smith*, 102 N.W. 668, 669-70 (Mich. 1905) (same); *Gumberg v. Treusch*, 61 N.W. 872, 875 (Mich. 1895) (same). In Michigan, this doctrine is known as the "concert of action" rule, and the Sixth Circuit held it was correctly applied to State Farm's scheme allegations and evidence. Petitioners now contend that the Sixth Circuit erred because State Farm never used the exact phrases "concert of action" or "collusive agreement" to describe the Scheme. Pet. at 17-18. This argument is nonsense. A simple reading of the Sixth Circuit's opinion makes clear that it used the terms "collusive agreement" and "concert of action" synonymously with "scheme" throughout its entire discussion of this issue. While this Court does not need to reach this additional argument asserted by Petitioners for the reasons stated in this footnote, it also is not a basis to grant certiorari.

great detail as to why Petitioners' arguments of error failed. But for good measure, the Sixth Circuit also made clear that even if it were error to not give a conspiracy jury instruction, "the overwhelming evidence of a conspiracy between them, at any rate, shows that any such error would have been harmless." For all these reasons, this alleged point of error does not satisfy the requirements for reversing a court's refusal to give a jury instruction let alone the exacting standards for the grant of certiorari.

IV. THE PETITIONERS' NUMEROUS MISSTATEMENTS OF FACT AND LAW CONSTITUTE AN ADDITIONAL REASON TO DENY CERTIORARI.

Supreme Court Rule 14(4) provides that a Petitioner's failure to present its case with "accuracy" is, standing alone, a sufficient reason to deny a petition. In furtherance of this Rule, Supreme Court Rule 15(2) provides that "the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues would properly be before the Court if certiorari were granted." The rule further provides that "[c]ounsel are admonished that they have an obligation to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Sup. Ct. R. 15(2).

Although these rules are seldom used by the Court as a basis to deny a petition, State Farm believes that it is obliged to invoke them here, and respectfully submits that Petitioners' material misstatements of facts and law, standing alone, warrant the denial of the Petition.

A. Misstatements About Judge Friedman and The Conduct of The Trial

1. *"Petitioners did not receive a fair trial from the district judge that Respondent State Farm . . . selected for this case." Chief Judge Friedman "rewarded State Farm's confidence in him by systematically ruling in State Farm's favor on every substantive legal issue before him, facilely changing his reasoning and factual findings to suit whatever State Farm needed at the moment."*

This statement is patently incorrect and constitutes a scandalous and unsupportable accusation against a District Court judge. Supreme Court Rule 24(6) states that this Court may strike a brief that is not "free of irrelevant, immaterial, and scandalous matter."

First, State Farm did not "select" Judge Friedman. After Plaintiff Rivet filed a lawsuit against State Farm in state court, State Farm removed the case to the District Court. The district judge in this case was then *randomly* selected by the court computer. *See* E.D. Mich. LR ("Local Rule") 83.11(a)(1) ("In . . . Detroit . . . the Clerk shall employ a random method for the assignment of civil cases . . . ."). State Farm had no role whatsoever in the selection of the judge. State Farm subsequently filed counterclaims in this case against Petitioners, as was their right under Federal Rules of Civil Procedure 13, 19, and 20. In several orders, Judge Friedman held that the counterclaims were properly before him. (*See, e.g.*, 12/22/05 Order Denying Swagler's Motion to

Dismiss [Doc. 125]; 12/22/05 Order Granting in Part Courter-Defendants' Motion for Reconsideration [Doc. 126]; 3/6/06 Order Resolving Motions for Reconsideration [Doc. 155].) At no time during the pendency of this case did Petitioners challenge the right of Chief Judge Friedman to retain the counterclaims under Local Rule 83.11(a). Although they challenged his right to retain the counterclaims under Federal Rules 13, 19, and 20, as well as under other aspects of the Local Rules, as set forth above, the District Court rejected those arguments in a series of detailed opinions.[6]

Because Petitioners never appealed those rulings, they waived the argument. Accordingly, Petitioner's sole purpose in accusing State Farm of "selecting the judge," and accusing Judge Friedman of "rewarding [State Farm's] confidence in him," by "ruling in State Farm's favor on every substantive legal issue," and "facilely changing his reasoning and factual findings

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6. Petitioners also attempted to challenge Judge Friedman's retention of the counterclaims at issue in this case in other cases pending in the Eastern District of Michigan. Specifically, on July 25, 2005, in a case that Silverman filed on behalf of one of the Insureds, *Shures v. State Farm*, No. 04-CV-72396, Silverman filed a two-part motion seeking: (1) to disqualify Judge Friedman from presiding over both this case and *Shures*; and (2) to have both this case and *Shures* reassigned to Judge Arthur Tarnow as companion cases to *Scott v. State Farm*, No. 04-CV-72255, another case that Silverman filed for an Insured ("Motion for Reassignment"). The same day, in *Scott*, Silverman filed a Motion Requesting Consent to Reassignment of both this case and *Shures* to Judge Arthur Tarnow. On July 28, 2005, notwithstanding the fact that she was not a party to *Shures*, Swagler filed a Concurrence in Mr. Shures' Motion. These motions were all denied.

to suit whatever State Farm needed at the moment" (all of which is patently false from the record), is to falsely disparage both Judge Friedman and State Farm to this Court. Such an attack has no place in the Petition and presents a basis to either strike the Petition under Supreme Court Rule 24(6), or deny the Petition under Supreme Court Rule 14(4).

> 2. *"After refusing to give Mr. Silverman the time to read the entire proposed pleading, let alone file any response to the motion, the district court granted the motion to amend. Although he could not wait until Mr. Silverman had read the proposed pleading, he had time to heap praise on State Farm's counsel."*

This is false and another attempt to smear Judge Friedman to this Court. Again, such an attack has no place in a Supreme Court Petition.

Silverman had ample time to read the proposed Counterclaims and motion for leave to amend. Indeed, the record is clear that Silverman received both the Complaint and the motion by delivery on Friday, July 2, and did not appear in Court until Monday, July 5. The Counterclaims accused Silverman of engaging in a massive fraud Scheme, naming six of his existing clients as additional counter-defendants. Nevertheless, at the hearing on State Farm's motion for leave to amend, Silverman stated that he had not "even fully been able to read the motion" and the Counterclaims attached thereto. If Silverman, in fact, had not read the allegations in the approximately 72 hours that he was

in possession of them, such a failure to do so was of his own choosing. Notwithstanding Silverman's contention, however, the record suggests that he was clearly familiar with the contents of the allegations as he repeatedly referred to them during the hearing.

Moreover, although the Court preliminarily granted State Farm leave to file the Counterclaims, Judge Friedman stated at that hearing that Silverman preserved all his defenses with respect to the Counterclaims and that he could file a motion to reconsider the Court's decision if he wanted to provide law on the subject. Judge Friedman also indicated that Silverman and the other counter-defendants retained all their rights under Federal Rule of Civil Procedure 12 with respect to the new Counterclaims.

Over the next three months, Counter-Defendants filed six motions and concurrences, seeking to have the Counterclaims dismissed or removed from Judge Friedman's docket. (*See* 7/26/05 Joint Motion for Reconsideration re Order on Leave to File by Robert Rivet [Doc. 52]; 7/26/05 Concurrence in Motion for Reconsideration re Order on Motion for Leave to File by Lori Andres, Melissa Davis, Mark Phillips, Robert Rivet, Sonja Scott, Tracey Shures, Ramona Thomas [Doc. 53]; 7/29/05 Concurrence in Motion for Reconsideration re Order on Motion for Leave to File and the motions of the plaintiff for disqualification of Judge Friedman and declare this matter a companion case to be reassigned to Judge Tarnow by Swagler [Doc. 60]; Motion for Reassignment filed in *Scott v. State Farm*, No. 04-CV-72255; 8/22/05 Joint Motion to Drop All Counter-Defendants by Robert Rivet [Doc. 73];

9/26/09 Motion to Dismiss for Lack of Subject Matter Jurisdiction [Doc. 99].) Each motion was fully briefed, carefully considered, and individually ruled upon by the Court. It is clear, therefore, that Silverman received all of the process that was due him, indeed more, and that the Petition should be stricken under Supreme Court Rule 14(4) because of the numerous misstatements of fact contained therein.

> 3. "*Judge Friedman is a friend of a founding partner of State Farm's local counsel. This particular attorney had developed animosity toward Mr. Silverman when Mr. Silverman represented a client that sued a member of a prominent political family, who was represented by this attorney.*"

Petitioners' unsubstantiated statements about the supposed animosity of an unidentified lawyer who practices at the firm of State Farm's local counsel, but who was not involved in this case, as well as the clear inference that the animosity of Judge Friedman's unidentified "friend" caused Judge Friedman to be biased against Silverman, is not supported by any evidence in the record and has no place in the petition.[7]

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7. State Farm assumes that Petitioners are referring to Eugene Driker, a partner in the law firm retained by State Farm to serve as local counsel. Mr. Driker did not file an appearance or have any involvement in this case whatsoever. During the trial, on March 12, 2007, Mr. Driker, came to court to talk with Judge Friedman about a mutual friend who was ill. They had a private conversation outside the presence of the jury, and counsel for Petitioners subsequently complained that they did not "believe

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Moreover, although Petitioners moved to disqualify Judge Friedman, also based on an alleged unspecified bias by Judge Friedman, Petitioners never appealed the denial of that motion, either on an interlocutory basis or at the end of the case. Given the anonymous nature of Petitioner's allegation, it is also scandalous, as neither Judge Friedman, the firm that served as local counsel, nor counsel on this appeal, can respond to such unspecified allegations, let alone for the first time on appeal.

B. Misstatements Related To The Evidence Admitted Or Excluded At Trial.

1. *"The evidence at trial was almost exclusively devoted to how [Swagler] did not comply with [State Farm's] policies."*

This is simply not true. The ways in which Swagler failed to comply with State Farm policies was a miniscule part of the evidence. The majority of evidence

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(Cont'd)

it's appropriate just in the interest of avoiding an impropriety for the Court be having ex-parte conversations with any counsel during the course of the case." Petitioners further threatened that "We wouldn't want any grounds to challenge propriety of rulings when we get to the end of the case." Judge Friedman responded as follows: "If you think that creates some sort of impropriety of an attorney who does not have an appearance in the file to come to the sidebar outside the presence of the jury and we discuss some ill friend, then there's not much I can do." Moreover, Judge Friedman was clear that he did not speak with Mr. Driker in any way about this case. Accordingly, to the extent Petitioners are referring to Mr. Driker, there is simply no evidence that Mr. Driker has any animosity towards Petitioners, that Mr. Driker discussed this case with Judge Friedman, or that he caused Judge Friedman to be biased against them in any way.

extensively included documents and testimony related to:

- material misrepresentations and omissions that Silverman personally made in furtherance of the Scheme;
- material misrepresentations and omissions that Silverman's Legal PC made in furtherance of the Scheme;
- material misrepresentations and omissions that Silverman's Psychiatric PC made in furtherance of the Scheme;
- material misrepresentations and omissions Swagler made in furtherance of the Scheme (unrelated to the violation of any State Farm policy);
- Silverman's destruction, concealment, and manipulation of computer data during discovery by the court-appointed computer forensic expert;
- Silverman's destruction, concealment, and manipulation of computer data during the trial of the case;
- the nature and extent of the Silverman-Swagler relationship to explain the manner in which the Scheme originated and unfolded;
- the fact that Swagler had repeatedly and specifically been told not to take on cases that involved Silverman as insured's counsel because of her personal relationship with him;

- the extent to which Silverman and Swagler were in more than daily contact, including on nights and weekends, even though insisting that they were conducting arms-length negotiations as personal injury lawyer and claims adjuster; and

- damages suffered by State Farm as a result of the Scheme to defraud.

2. *"The district court judge refused to admit the public record [transcript] into evidence because Respondent and a non-party to this case had agreed to call the public record 'confidential.'"*

This is incorrect in several material respects. Fist, confidentiality was only one of two grounds upon which the District Court judge excluded the transcript at issue. The District Court also found that the document was irrelevant to the Scheme because it was entered three years after the Scheme was uncovered. Second, the Court did not refuse to admit the public record transcript because the parties had agreed that the *transcript* was confidential. Rather, Silverman himself conceded, and the Court agreed, that all parties to the underlying settlement agreement agreed that the *settlement* was confidential, and that the sole reason that the transcript of the settlement proceeding had not been made confidential was because an error had occurred. The Court concluded that the error in failing to file the transcript under seal was not a basis to admit the document. Third, Silverman, as the insured's attorney, agreed to the confidentiality of the Apostolopolous Settlement and thus, Petitioner's statement that

State Farm and "a non-party to this case" agreed to the confidentiality provision is also false.

Again, Petitioners' false and misleading misrepresentations to this Court require denial of their Petition for certiorari.

C. Misstatements About The Basis Upon Which The Court of Appeals Affirmed The Fraud Verdicts.

1. *"The court of appeals affirmed the judgment based upon two new legal theories that were never raised in the district court. One of these new theories was raised by State Farm for the first time at oral argument. The second was not even raised by State Farm. Instead, the circuit court itself raised the theory in its opinion affirming the judgment."*

This is incorrect. State Farm's legal theory or claim in the District Court was that Silverman and Swagler engaged in a "a scheme to defraud." The two new alleged "legal theories" that Petitioners refer to here are "concert of action" and "collusive agreement." Under Michigan law, however, "concert of action" and "collusive agreement" are not different legal theories than a "scheme to defraud." Rather, they are simply different words to describe the same legal theory. The notion that State Farm raised "concert of action" for the first time at oral argument or that the appellate court considered "collusive agreement" and "scheme to defraud" to be different legal claims is belied by both Michigan law and the record in this case.

This Court should not reward parties whose petitions are replete with false and misleading representations by granting the rare and extraordinary relief of certiorari. Accordingly, State Farm respectfully requests that the Court deny Petitioners' request for a writ of certiorari pursuant to Supreme Court Rule 14(4).

CONCLUSION AND RELIEF REQUESTED

For all these reasons, Respondent State Farm respectfully requests this Court to deny the writ of certiorari requested.

Respectfully submitted,

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